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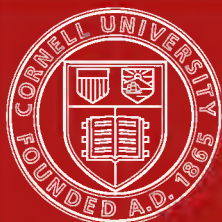
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A  
TREATISE  
ON  
LAW AND EQUITY  
AS  
DISTINGUISHED AND ENFORCED  
IN THE  
COURTS OF THE UNITED STATES.

By A. J. PEELER.

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## PREFACE.

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The distinction between *law* and *equity* is a distinguishing feature in the administration of remedial justice in the courts of the United States. A failure to appreciate and observe this distinction has resulted in the dismissal of many cases. After long and expensive litigation in the court below, it not unfrequently happens, when a case reaches the Supreme Court of the United States, it is dismissed because brought on the wrong side of the court, or reversed because the differences in pleading and practice between the two systems were totally disregarded. Scarcely a volume of the circuit decisions can be taken up which does not contain such examples of time, labor and money thrown away. No treatise designed to assist the profession in avoiding the vexation and disappointment so frequently experienced on this subject has ever been published. I first thought of limiting this work, as of most practical value, to the matters covered by the fourth chapter, distinguishing between legal and equitable, primary and remedial rights, and treating of the rule which confines legal remedies to the law side, and equitable remedies to the equity side of the court. But, upon reflection, I was convinced it would serve a more useful purpose if it included a consideration of common law and equity, as recognized and contradistinguished in the Constitution and Statutes of the United States, with an outline of the nature and general principles of Federal jurisdiction, and of the jurisdiction of the several courts of the United States, and a general view of the source of the legal and equitable rights to be adjudicated in said courts, and the rules of decision with respect thereto. This greatly enlarged the scope of the work, and while it is not intended to cover in detail the whole field of Federal practice, or to supersede works

which profess to do so, it will be found, it is believed, to embrace nearly all material matters, and especially to treat with more than ordinary fullness of the relations of the Federal and State courts to each other—a matter of great and daily increasing importance.

Prepared, as this book has been, in the intervals between active professional engagements, it will be found, no doubt, to possess many faults; but, with its faults, I submit it to the just judgment of a learned and generous profession, who, though quick to detect error, look indulgently upon any sincere effort, however humble, which tends to lighten their labors.

A. J. P.

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# LAW AND EQUITY

IN

## UNITED STATES COURTS.

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### CHAPTER I.

#### COMMON LAW AND EQUITY AS RECOGNIZED AND CONTRA-DISTINGUISHED IN THE CONSTITUTION AND STATUTES OF THE UNITED STATES.

§ 1. **Federal Convention.**—By reference to the Madison Papers<sup>1</sup> on the Debates in the Federal Convention, it will be seen that the report of the Committee on Detail, made through Mr. Rutledge, of South Carolina, failed in the judiciary article to distinguish between, or even to mention, common law or equity. When this article came up for consideration, Dr. Johnson, of Connecticut, suggested that the judicial power ought to extend to equity as well as law, and moved to insert the words “both in law and equity” after the words “United States,” in the first line of the first section. Mr. Read, of Delaware, objected to vesting these powers in the same court, but the amendment was adopted.<sup>2</sup> The section, as thus amended, read: “The judicial power of the United States, *both in law and equity*, shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.” The Committee on Revision, consisting of Dr. Johnson, Mr.

<sup>1</sup> Sup. to Elliott's Debates, vol. 5, p. 380.

<sup>2</sup> *Id.*, p. 481.

Alexander Hamilton, Mr. Gouverneur Morris, Mr. James Madison and Mr. Rufus King, instead of retaining the words "in law and equity" in the first section, gave effect to Dr. Johnson's amendment by inserting them in the second section, to which, as pertaining to the distribution of judicial power, they more appropriately belonged. Said section (§ 2, Art. III.) reads: "THE JUDICIAL POWER SHALL EXTEND TO ALL CASES IN LAW AND EQUITY ARISING UNDER THIS CONSTITUTION, THE LAWS OF THE UNITED STATES AND TREATIES MADE, OR WHICH SHALL BE MADE, UNDER THEIR AUTHORITY; TO ALL CASES AFFECTING AMBASSADORS, OR OTHER PUBLIC MINISTERS AND CONSULS; TO ALL CASES OF ADMIRALTY AND MARITIME JURISDICTION; TO CONTROVERSIES TO WHICH THE UNITED STATES SHALL BE A PARTY; TO CONTROVERSIES BETWEEN TWO OR MORE STATES; BETWEEN A STATE AND CITIZENS OF ANOTHER STATE; BETWEEN CITIZENS OF DIFFERENT STATES; BETWEEN CITIZENS OF THE SAME STATE CLAIMING LANDS UNDER GRANTS OF DIFFERENT STATES; AND BETWEEN A STATE, OR THE CITIZENS THEREOF, AND FOREIGN STATES, CITIZENS OR SUBJECTS." Thus was secured, as it appears in the CONSTITUTION, the declaration that "the judicial power shall extend to ALL CASES IN LAW AND EQUITY."

**§ 2. Constitutional Amendments.**—The seventh amendment which was proposed by Congress at its first session in 1789, provides: "In suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise examined in any court of the United States than according to the rules of the common law." And the eleventh amendment, which was proposed in 1794, declares that "The judicial power of the United States shall not be construed to extend to any suit in *law* or *equity* commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state."<sup>3</sup>

<sup>3</sup> This last (eleventh amendment) was caused, as the reader will remember, by the celebrated case of *Chisholm v. Georgia*, 2 Dall., 419. For a full and interesting history of this amendment, see *Cohens v. Virginia*, 6 Wheat., 264; 1 Kent Com., Lect. 14. Now, no suit lies by an alien or citizen against a State in the Federal court.

§ 3. Why the words "Law and Equity" and "Common Law and Equity" were inserted in the Constitution.—In making a written CONSTITUTION, it was natural for the Colonies to have in view the institutions brought with them from the mother country, and with which they were familiar. If this were true of matters pertaining to the purely political departments of the government, it would be especially so of those affecting the administration of justice. English jurisprudence, with its long and well-recognized distinction between law and equity as separate systems of remedial justice, would necessarily be taken as a guide in fixing the extent of judicial power. And any distribution of this power which should fail to recognize in explicit terms both *law* and *equity* would fail to meet the requirements of the case. It would be expected that the fundamental law should contain an affirmative declaration that the judicial power of the Federal Government should extend to cases of equitable as well as legal cognizance.<sup>4</sup> The reason given by the court in the case of *Robinson v.*

<sup>4</sup> Mr. Curtis, in his *History of the Constitution* (vol. 2, p. 425), after speaking of the omission, to which we have already directed attention, on the part of the Committee on Detail to recognize the distinction between law and equity, says: "This distinction, which extends not only to forms of pleadings, but to the principles of decisions, the mode of trial, and the nature of the remedy, had been brought by the settlers of most of the Colonies from England, and had been perpetuated in their judicial institutions. It existed in most of the States at the time of the formation of the National Constitution, and it was in fact a characteristic feature of the only system of judicature which the American people had known, excepting in their courts of admiralty. Although the institutions of the States differ in the degree in which they had adopted and followed it, the basis of their jurisprudence and forms of proceeding was the common law as derived from the English sources and modified by their own custom or legislation, with more or less of that peculiar and more ample relief which is afforded by the jurisprudence and remedy known in the English system under the name of equity. Since the judicial powers of the United States were to be exercised over a people whose judicial habits were those fixed, since it must, to some extent, take cognizance of rights that would have to be adjudicated in accordance with the jurisprudence under which they had arisen, and since the individuals who would have a title to enter its tribunals might reasonably demand remedies as ample as a judicature of English origin could furnish, it was highly expedient that the constitutions should fully adopt the main features of that judicature." "It is quite true," continues the learned author, "that a provision in the Constitution extending the judicial power to 'all cases' affecting certain persons or certain rights, might be re-

Campbell<sup>5</sup> why it could not have been the intention of Congress, by the act of May 8, 1792, to confine the courts of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respec-

garded by the legislature as a sufficient authority for the establishment of inferior courts with both a legal and an equitable jurisdiction, and might be considered to confer such a double jurisdiction on the supreme tribunals contemplated by the Constitution. But the test of the Constitution itself would be the source to which the people of the United States would look, when called upon to adopt it, for the benefits which they were to derive from it, and there would be no part of it which they would scrutinize more closely than that which was to establish the judicial power of the new government. If they found in it no imperative declaration making it the duty of Congress to provide for a jurisdiction in equity as well as law, and no express adoption of such a jurisdiction for the supreme tribunal, they might well say the character of the judicial power was left to the accidental choice of Congress or to doubtful interpretation, instead of being expressly ordained in its full and essential proportion by the people. If a citizen of a State were to pursue a remedy in the courts of the Union against a citizen of another State, or if one State should have a judicial controversy with another, that would be a very imperfect system of judicature, which should leave the form and extent of the remedy to be determined by the local law where the process was to be instituted, or should confine the relief to the form and proceedings of the common law. If the appellate jurisdiction of the supreme National tribunal were to be exercised over any class of controversies originating in the State courts, it was extremely important that the Constitution should expressly ascertain whether suits at law, or suits in equity, or both, were to be embraced within that appellate power. For these reasons it became necessary for the convention to supply this defect by extending the judicial power, both in equity and law, to the several cases embraced in it."

In discussing the judiciary article of the Constitution, in the *Federalist* (No. lxxx), it is said: "It has also been asked what need of the word 'equity.' What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals which may not involve those ingredients of *fraud, accident, trust, or hardship*, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains. These are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law,<sup>6</sup> yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the Federal judicatories to do justice without an equitable, as well as a legal jurisdiction. Agreements to convey lands claimed under

<sup>5</sup> 3 Wheat., 212.

tive States, furnishes a strong argument in favor of conferring by the CONSTITUTION, *eo nomine*, jurisdiction in equity as well as law. They say: "In some States in the Union no court of chancery exists to administer equitable relief. In other States, courts of law recognize and enforce in suits at law all the equitable claims and rights which a court of equity would recognize and enforce; in others, all relief is denied, and such equitable claims and rights are considered as mere nullities at law. A construction, therefore, that would adopt the State practice in all its extent *would at once extinguish in the latter States the exercise of equitable jurisdiction.*"

Referring to the seventh amendment,<sup>6</sup> the court, in *Parsons v. Bedford et al.*,<sup>7</sup> Mr. Justice Story, delivering the opinion, says: "At this time (1789) there were no States in the Union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning, and probably no States were contemplated in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to *equity*, and admiralty, and maritime jurisprudence. The CONSTITUTION had declared, in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this

the grants of different States may afford another example of the necessity of an equitable jurisdiction in the Federal courts. This reasoning may not be so palpable in those States where the formal and technical distinction between LAW and EQUITY is not maintained as in this State (New York), where it is exemplified by every day's practice."

One of the first acts of the Assembly of New York, after the people of the Colony were admitted to a share in the legislative power, was to declare that there should be a COURT OF CHANCERY, which should hear and determine all matters of *equity*, and be esteemed the Supreme Court of the Colony.

Smith's History of New York (Carey's Ed.), 87, 88, 112, 113.

The reader desiring information upon the history and extent of equity jurisprudence, and the manner of its exercise through the varying tribunals of the several Colonies and States, may consult note to 1 Watterman's *Eden on Injunctions*, p. 166; Bispham's *Principles of Equity*, chap. 1, sec. 12, *et seq.*, p. 20; 1 Story's *Eq. Jur.*, secs. 56, 57, 58; 4 Kent's *Com.*, Lect. lviii (2d Ed.), p. 179, note d; note by Antony Laussat, Esq., to his (third American) edition of Fonblanque's *Equity*, p. 11, *et seq.*; preface to Campbell and Cambreling's *American Chancery Digest* (Ed. 1828).

<sup>6</sup> See sec. 2, *ante*, p. 2.

<sup>7</sup> 3 Pet., 433.

CONSTITUTION, the laws of the United States, and treaties made, or which shall be made, under their authority, etc., and to all cases of *admiralty and maritime jurisdiction*.' It is well known that in civil causes in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at *common law*, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *common law*, they meant what the CONSTITUTION denominated in the third article 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which *legal rights* were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. Probably there were few, if any, States in the Union, in which some new legal remedies, differing from the old common law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

**§ 4. Distinction Rests on Constitution.**—Though often spoken of, as we shall have occasion hereafter to see, in connection with the statutes alone, still the establishment of law and equity, as distinct systems in the administration of Federal jurisprudence, is ascribable directly to the CONSTITUTION itself. In *Boyle v. Zacherie*<sup>8</sup> it is said: "The chancery jurisdiction given by the CONSTITUTION and

<sup>8</sup> 6 Pet., 648.

laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all.”<sup>9</sup>

In *Story v. Livingston*,<sup>10</sup> where, amongst other exceptions to a master’s report, it was urged that chancery practice had been abolished by a rule of the United States District Court of Louisiana, and that such proceeding was unknown to the practice of that court, it is said: “We think the occasion, however, a proper one for this court to remark, if any such rule has been made by the District Court in Louisiana, that it is in violation of those rules which the Supreme Court of the United States has passed to regulate the practice in the courts of equity in the United States. They are as obligatory upon the courts of the United States in Louisiana as they are upon all other United States courts, and the only modifications or additions which can be made in them by the circuit or district courts are such as shall not be inconsistent with the rules prescribed.

“Where the rules prescribed by the Supreme Court to the circuit courts do not apply, the practice of the circuit and district courts shall be regulated by the practice in the High Court of Chancery in England. The parties to suits in Louisiana have a right to the benefit of them; nor can they be denied by any rule or order without causing delays, producing unnecessary and oppressive expenses, and in the greater number of instances, an entire denial of equitable rights. This court has said upon more than one occasion, after mature deliberation upon able arguments of distinguished counsel against it, that the courts of the United States in Louisiana possess equity powers under the Constitution and laws of the United States.”<sup>11</sup>

In *Bennett v. Butterworth*,<sup>12</sup> Taney, Chief Justice, delivering the opinion of the court, says: “The common law has been adopted in Texas, but the forms and rules of pleading in common law cases have been abolished, and the parties are at liberty to set out their respective

<sup>9</sup> See also *U. S. v. Howland*, 4 Wheat., 108.

<sup>10</sup> 13 Pet., 359.

<sup>11</sup> See also *Gaines v. Relf*, 15 Pet., 9.

<sup>12</sup> 11 How., 669.

claims and defenses in any form that will bring them before the court. And as there is no distinction in its courts between cases at law and equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or as a bill in equity. Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. And, although the forms of proceedings and practice in the State courts have been adopted in the district court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The CONSTITUTION of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to the rules which this court has prescribed (under the authority of the act of August 23, 1842,) regulating proceedings in equity in the courts of the United States."

In *Neves v. Scott*,<sup>13</sup> Mr. Justice Curtis, speaking for the court, uses this language: "Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court, in the last resort, to decide what

<sup>13</sup> 13 How., 268; see also *State of Pennsylvania v. Wheeling Bridge Co.*, *id.*, 518 where quoting sec. 2 of art. III. of the Constitution, the court say: "Chancery jurisdiction is conferred on the courts of the United States with the limitation 'that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' The rules of the High Court of Chancery of England have been adopted by the courts of the United States, and there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a State court. In exercising this jurisdiction the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established."



those principles are and to apply such of them to each particular case as they may find justly applicable thereto. These principles may make part of the law of a State, or they may have been modified by its legislation or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States, but in all the States the equity law recognized by the CONSTITUTION and by the acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

Where it was sought, upon a title merely legal, to maintain in the United States Circuit Court, what was, in substance and legal effect, an ejectment bill, the court, adverting to the practice which prevented such a proceeding, said: "The departing from that practice, where there is no necessity for so doing, would be subversive of the legal and CONSTITUTIONAL distinctions between the different jurisdictions of law and equity, and though the admission of a party in a suit is conclusive as to matters of fact, or may deprive him of the benefit of a privilege which, if insisted on, would exempt him from the jurisdiction of the court, yet no admission of parties can change the law or give jurisdiction to a court in a cause of which it hath no jurisdiction."<sup>14</sup>

Referring to section 2 of article III. of the CONSTITUTION, declaring "that the judicial power of the United States shall extend to all causes in law and equity," etc., the court, in *Fenn v. Holme*,<sup>15</sup> say: "By the CONSTITUTION of the United States, and by the acts of Congress organizing the Federal courts and defining and investing the jurisdiction of these tribunals, the distinction between common law and equity jurisdiction has been explicitly declared and carefully defined and established." In *Noonan v. Lee*<sup>16</sup> it is said: "The equity jurisdiction of the courts of the United States is derived from the CONSTITUTION and laws of the United States. Their powers and

<sup>14</sup> *Hipp v. Babin*, 19 How., 271.

<sup>15</sup> 21 How., 481.

<sup>16</sup> 2 Black, 499.

rules of decision are the same in all the States." And in *Thompson v. Railroad Companies*<sup>17</sup> this language is used: "The CONSTITUTION of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles." In *Smith v. Railroad Company*,<sup>18</sup> the case of *Boyle v. Zacharie*, *supra*, and in *Hurt v. Hollingsworth*,<sup>19</sup> the case of *Thompson v. Railroad Companies*, *supra*, are cited with approval, so that from among the earliest down to the latest adjudications of the highest judicial tribunal of our country, we have the CONSTITUTION referred to as recognizing and perpetuating the distinction between law and equity. Resting on a foundation less solid and permanent, it is hardly probable it could thus far have withstood the tide of innovation and experiment which has, in practice at least, obliterated it in nearly every State of the Union.<sup>20</sup>

**§ 5. Distinction as Recognized by Statute.**—It is not our purpose in this place to notice, much less discuss, all of the numerous provisions upon this subject, but merely to present in a general way the extent to which, and the manner in which, Congress has seen fit, in conferring original jurisdiction upon the several courts, to recognize the separateness of the two systems, and to mention in terms the one or the other. Beginning with what is known as the Judiciary Act,<sup>21</sup>

<sup>17</sup> 6 Wall., 134.

<sup>18</sup> 99 U. S., 398.

<sup>19</sup> 100 U. S., 100.

<sup>20</sup> In addition to the sources of information referred to at the conclusion of note 4, *ante* p. 5, on the history of equity jurisprudence as administered in the several States, the reader may consult Mr. Pomeroy's recent work on Equity Jurisprudence, volume 1, chapter 3, p. 307.

<sup>21</sup> 1 Stats. at L., 73. This act is not only first in point of time, but has been the foundation of nearly all subsequent legislation relating to the jurisdiction of the courts of the United States. It is perhaps more frequently referred to than any other law passed by Congress, and whilst some, and it may be conceded important, changes have been found necessary, it contains throughout evidences of wisdom, forethought,

passed at its first session in 1789, we find the distinction between common law and equity carefully preserved. In section 11 it is declared that "the circuit courts shall have original cognizance concurrent with the courts of the several States of all suits of a civil nature at

and learning scarcely less marked than those which distinguish the judiciary provisions of the Constitution itself. As a legislative construction of the powers conferred by the Constitution, standing, as its framers did, in such intimate relation to those who made the Constitution, and passed as it was the same year that that instrument went into effect, it is entitled to the highest consideration. Indeed it may be questioned whether, keeping in view the circumstances under which it was passed, and the contrariety of opinion naturally to be expected, even among statesmen and lawyers of the first ability, it is not, taking it all in all, the most excellent piece of legislative work to be found among the Federal Statutes. Mr. Chief Justice Marshall, in *Cohens v. Virginia* (6 Wheat., 264), after quoting from the *Federalist*, says: "A contemporaneous exposition of the Constitution, certainly of not less authority than that which has just been cited, is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which framed the Constitution." See also remarks of Judge Dillon in his *Removal of Causes* (2d Ed., pp. 1-2.)

The importance, to a proper understanding of many of the cases that will be cited and reviewed, of having this act before the reader, makes it proper, if not absolutely indispensable, that we give in full all its provisions:

CHAPTER 20.—An act to establish the judicial courts of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Supreme Court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

SEC. 2. *And be it further enacted*, That the United States shall be, and they hereby are, divided into thirteen districts, to be limited and called as follows, to-wit: one to consist of that part of the State of Massachusetts which lies easterly of the State of New Hampshire, and to be called Maine district; one to consist of the State of New Hampshire, and to be called New Hampshire district; one to consist of the remaining part of the State of Massachusetts, and to be called Massachusetts district; one to consist of the State of Connecticut, and to be called Connecticut district; one to consist of the State of New York, and to be called New York district; one to consist of the State of New Jersey, and to be called New Jersey district; one to consist of the State of Pennsylvania, and to be called Pennsylvania district; one to consist of the State of Delaware, and to be called Delaware district; one to consist of the State of Maryland, and to be called Maryland district; one to consist of the State of Virginia, except that part called the district of Kentucky, and to be called Vir-

*common law* or in *equity*." In section 12, that "the trial of issues in fact in the circuit courts shall, in all suits, except those of *equity* and of admiralty and maritime jurisdiction, be by jury." In section 16, that "*suits in equity* shall not be sustained in either of the courts of

ginia district; one to consist of the remaining part of the State of Virginia, and to be called Kentucky district; one to consist of the State of South Carolina, and to be called South Carolina district; and one to consist of the State of Georgia, and to be called Georgia district.

SEC. 3. *And be it further enacted*, That there be a court called a district court, in each of the aforementioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a district judge, and shall hold annually four sessions, the first of which to commence as follows, to-wit: in the districts of New York and of New Jersey on the first, in the district of Pennsylvania on the second, in the district of Connecticut on the third, and in the district of Delaware on the fourth, Tuesday of November next; in the districts of Massachusetts, of Maine, and of Maryland, on the first, in the district of Georgia on the second, and in the districts of New Hampshire, of Virginia, and of Kentucky, on the third Tuesdays of December next; and the other three sessions progressively in the respective districts on the like Tuesdays of every third calendar month afterwards; and in the district of South Carolina, on the third Monday in March and September, the first Monday in July, and the second Monday in December of each and every year, commencing in December next; and that the district judge shall have power to hold special courts at his discretion. That the stated district court shall be held at the places following, to-wit: in the district of Maine, at Portland and Pownalsborough alternately, beginning at the first; in the district of New Hampshire, at Exeter and Portsmouth alternately, beginning at the first; in the district of Massachusetts, at Boston and Salem alternately, beginning at the first; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the first; in the district of New York, at New York; in the district of New Jersey, alternately at New Brunswick and Burlington, beginning at the first; in the district of Pennsylvania, at Philadelphia and Yorktown alternately, beginning at the first; in the district of Delaware, alternately at Newcastle and Dover, beginning at the first; in the district of Maryland, alternately at Baltimore and Easton, beginning at the first; in the district of Virginia, alternately at Richmond and Williamsburgh, beginning at the first; in the district of Kentucky, at Harrodsburgh; in the district of South Carolina, at Charleston; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first; and that the special courts shall be held at the same place in each district as the stated courts, or in districts that have two, at either of them, in the discretion of the judge, or at such other place in the district, as the nature of the business and his discretion shall direct. And that in the districts that have but one place for holding the district court, the records thereof shall be kept at that place; and in districts that have two, at that place in each district which the judge shall appoint.

SEC. 4. *And be it further enacted*, That the before mentioned districts, except those

the United States in any case where a plain, adequate and complete remedy may be had at law;" and in section 34, that "the laws of the several States, except where the CONSTITUTION, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded

of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit. That the eastern circuit shall consist of the districts of New Hampshire, Massachusetts, Connecticut and New York; that the middle circuit shall consist of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia; and that the Southern circuit shall consist of the districts of South Carolina and Georgia, and that there shall be held annually in each district of said circuits, two courts, which shall be called circuit courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum; *provided*, that no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.

SEC. 5. *And be it further enacted*, That the first session of the said circuit court in the several districts shall commence at the times following, to-wit: in New Jersey on the second, in New York on the fourth, in Pennsylvania on the eleventh, in Connecticut on the twenty-second, and in Delaware on the twenty-seventh, days of April next; in Massachusetts on the third, in Maryland on the seventh, in South Carolina on the twelfth, in New Hampshire on the twentieth, in Virginia on the twenty-second, and in Georgia on the twenty-eighth, days of May next, and the subsequent sessions in the respective districts on the like days of every sixth calendar month afterwards, except in South Carolina, where the session of the said court shall commence on the first, and in Georgia where it shall commence on the seventeenth day of October, and except when any of those days shall happen on a Sunday, and then the session shall commence on the next day following. And the sessions of the said circuit court shall be held in the district of New Hampshire, at Portsmouth and Exeter alternately, beginning at the first; in the district of Massachusetts, at Boston; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the last; in the district of New York, alternately at New York and Albany, beginning at the first; in the district of New Jersey, at Trenton; in the district of Pennsylvania, alternately at Philadelphia and Yorktown, beginning at the first; in the district of Delaware, alternately at Newcastle and Dover, beginning at the first; in the district of Maryland, alternately at Annapolis and Easton, beginning at the first; in the district of Virginia, alternately at Charlottesville and Williamsburgh, beginning at the first; in the district of South Carolina, alternately at Columbia and Charleston, beginning at the first; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first. And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion, or at the discretion of the Supreme Court.

SEC. 6. *And be it further enacted*, That the Supreme Court may, by any one or more of its justices being present, be adjourned from day to day until a quorum be convened; and that a circuit court may also be adjourned from day to day by any

as rules of decision at *common law*." At the same session, and but a few days after the approval of the Judiciary Act, Congress passed a temporary act<sup>22</sup> to regulate processes in the courts of the United States, declaring that the "forms of writs and executions (except their

one of its judges, or if none are present, by the marshal of the district, until a quorum be convened; and that a district court, in case of the inability of the judge to attend at the commencement of a session, may by virtue of a written order from the said judge, directed to the marshal of the district, be adjourned by the said marshal to such day, antecedent to the next stated session of the said court, as in the said order shall be appointed; and in case of the death of the said judge, and his vacancy not being supplied, all process, pleadings and proceedings of what nature soever, pending before the said court, shall be continued of course until the next stated session after the appointment and acceptance of the office by his successor.

SEC. 7. *And be it further enacted*, That the Supreme Court and the district courts shall have power to appoint clerks for their respective courts, and that the clerk for each district court shall be clerk also of the circuit court in such district, and each of the said clerks shall, before he enters upon the execution of his office, take the following oath or affirmation, to-wit: "I, A. B., being appointed clerk of . . . . ., do solemnly swear, or affirm, that I will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God." Which words, so help me God, shall be omitted in all cases where an affirmation is admitted instead of an oath. And the said clerks shall also severally give bond, with sufficient sureties (to be approved of by the Supreme and district courts respectively), to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk.

SEC. 8. *And be it further enacted*, That the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to-wit: "I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as . . . . ., according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

SEC. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive

<sup>22</sup> Act of September 29, 1789, 1 Stats. at L., 93.

style), and modes of process, and rates of fees, etc., in the circuit and district courts, in *suits at common law*, shall be the same in each State respectively as were then used or allowed in the Supreme Courts of the same;" and that "forms and modes of proceeding in *causes of*

original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

SEC. 10. *And be it further enacted*, That the district court in Kentucky district shall, besides the jurisdiction aforesaid, have jurisdiction of all other causes, except of appeals and writs of error, hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court, and writs of error and appeals shall lie from decisions therein to the Supreme Court in the same causes, as from a circuit court to the Supreme Court, and under the same regulations. And the district court in Maine district shall, besides the jurisdiction hereinbefore granted, have jurisdiction of all causes, except of appeals and writs of error hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court. And writs of error shall lie from decisions therein to the circuit court in the district of Massachusetts in the same manner as from other district courts to their respective circuit courts.

SEC. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one dis-

*equity* and of admiralty and maritime jurisdiction should be according to the course of the civil law."

And in the process act of May 8, 1879, § 2, a similar provision was made with respect to proceedings in suits at *common law*; and with re-

strict for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided.

SEC. 12. *And be it further enacted*, That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, or if in the district of Maine to the district court next to be holden therein, or if in Kentucky district, to the district court next to be holden therein, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of such State they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced. And if in any action commenced in a State court, the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a State other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the State in which the suit is pending, the said adverse [party] shall give such



spect to suits in *equity* and in admiralty, it was expressly declared that these should be, "according to the rules, principles, and usages, which belong to *courts of equity* and to courts of admiralty respectively, as *contradistinguished* from courts of common law."

information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he informs that he does claim under such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district, or if in the district of Maine, to the court next to be holden therein; or if in Kentucky district, to the district court next to be holden therein; but if he is the defendant, shall do it under the same regulations as in the before mentioned case of the removal of a cause into such court by an alien; and neither party removing the cause, shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.

SEC. 13. *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice-consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several States, in the cases herein-after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

SEC. 14. *And be it further enacted*, That all the before mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment; *provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

SEC. 15. *And be it further enacted*, That all the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or

**§ 6. Same, Revised Statutes.**—In section 563, defining the jurisdiction of the district court, “suits at common law,” and “suits in equity,” and “suits at law or in equity,” are expressly mentioned. By subdivision four of said section, the jurisdiction of said court is

power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of non-suit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default.

SEC. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.

SEC. 17. *And be it further enacted*, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.

SEC. 18. *And be it further enacted*, That when in a circuit court, judgment upon a verdict in a civil action shall be entered, execution may on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon from either of the judges of such court, that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said court. And if a new trial be granted, the former judgment shall be thereby rendered void.

SEC. 19. *And be it further enacted*, That it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree, by a stating of the case by the court.

SEC. 20. *And be it further enacted*, That where, in a circuit court, a plaintiff in an action, originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, or a libellant, upon his own appeal, less than the sum or value of three hundred dollars, he shall not be allowed, but at the discretion of the court, may be adjudged to pay costs.

SEC. 21. *And be it further enacted*, That from final decrees in a district court in

extended to "all suits at *common law* brought by the United States, or by any officer thereof authorized by law to sue;" and by subdivision five, to "all *suits in equity* to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject

causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court, to be held in such district; *provided, nevertheless*, that all such appeals from final decrees as aforesaid, from the district court of Maine, shall be made to the circuit court, next to be holden after each appeal in the district of Massachusetts.

SEC. 22. *And be it further enacted*, That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the Supreme Court, the adverse party having at least twenty days' notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.

SEC. 23. *And be it further enacted*, That a writ of error as aforesaid shall be a supersedeas and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas; and whereupon such writ of error the Supreme or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.

to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title or interest." Subdivision twelve of the same section gives jurisdiction "of all suits *at law or in equity*, authorized by law to be brought by any person to redress the

SEC. 24. *And be it further enacted*, That when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon.

SEC. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

SEC. 26. *And be it further enacted*, That in all causes brought before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach or non-performance shall appear, by the default or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which

deprivation, under color of any law, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States, to persons within the jurisdiction thereof."

judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

SEC. 27. *And be it further enacted*, That a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit. And to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either; and before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies, before the judge of the district court to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: "I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of . . . . ., under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the district of . . . . ., during my continuance in said office, and take only my lawful fees. So help me God."

SEC. 28. *And be it further enacted*, That in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof may appoint, and the person so appointed, is hereby authorized to execute and return the same. And in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed; and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn. And the defaults or misfeasances in office of such deputy or deputies in the meantime, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life and the exercise of his said office, until his successor was appointed, and sworn or affirmed. And every marshal or his deputy when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands

In section 629, covering some twenty heads of original jurisdiction of the circuit court, *law* and *equity* are frequently mentioned and distinguished. The general jurisdiction clause, as contained in the first subdivision of said section, uses the words, "all suits of a civil na-

respectively at the time of such removal or expiration of office; and the marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody until his successor shall be appointed and qualified as the law directs.

SEC. 29. *And be it further enacted*, That in cases punishable with death, the trial shall be had in the county where the offense was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State, and shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. And writs of *venire facias* when directed by the court shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation that he will truly and impartially serve and return such writ. And when from challenges or otherwise there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return jurymen *de talibus circumstantibus* sufficient to complete the panel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint.

SEC. 30. *And be it further enacted*, That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme

ture at *common law* or in *equity*." And again, in the second subdivision, we find cognizance given "of all *suits in equity* where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners;" in the third,

or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided*, That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a fail-

"of all suits at *common law*, where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs;" and in the fourth subdivision, "of all *suits at law or in equity* arising under any act providing for revenue from imports or tonnage, except

ure or delay of justice, which power they shall severally possess, nor to extend to depositions taken in *perpetuam rei memoriam*, which if they relate to matters that may be cognizable in any court of the United States, a circuit court on application thereto made as a court of equity, may, according to the usages in chancery direct to be taken.

SEC. 31. . *And be it further enacted*, That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending, is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator who shall become a party as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of the said court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed as the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

SEC. 32. *And be it further enacted*, That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially sit down and express together with his demurrer as the cause thereof. And the said courts respectively shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such



civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures ; of all causes arising under any law providing for internal revenue, and of all causes aris-

conditions as the said courts respectively shall in their discretion, and by their rules prescribe.

SEC. 33. *And be it further enacted*, That for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case ; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or a circuit court, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law. And if a person committed by a justice of the Supreme or a judge of a district court for an offense not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the Supreme or superior court of law of such State.

SEC. 34. *And be it further enacted*, That the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

SEC. 35. *And be it further enacted*, That in all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein. And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the

ing under the postal laws." By the ninth subdivision of said section jurisdiction is conferred "of all suits at *law* or *in equity* arising under the patent or copyright laws of the United States."

With respect to the Supreme Court: the jurisdiction given by section 687 of the Revised Statutes, taken from section 13 of the Judiciary Act of 1789,<sup>23</sup> was held, very soon after the passage of said act, to embrace cases both at law and in equity.<sup>24</sup> By section 688, power is conferred upon said court "to issue writs of prohibition to the dis-

Supreme Court in the district in which that court shall be holden. And he shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

Approved September 24, 1789.

<sup>23</sup> For section in full, see *ante*, p. 13.

<sup>24</sup> The State of Georgia v. Brailsford (2 Dall., 402), brought originally in the Supreme Court at its August term, 1792, was a suit *in equity*, in which an injunction was granted. No question was made of the jurisdiction of the court. Justice Cushing, however, thought the case made by the bill one not justifying the exercise of equitable jurisdiction, and suggested that the State might have brought an action of *indebitatus assumpsit*. Afterwards, at the February term, 1794, (3 Dall., 1) the cause was tried by a special jury on an amicable issue, and under a charge from Chief Justice Jay the jury found a verdict for the defendant.

Chisholm v. The State of Georgia (2 Dall., 419) was an action of *assumpsit* brought originally in the Supreme Court at the August term, 1793. The court held that the action would lie, and made an order that unless the State of Georgia should appear and show cause to the contrary by the first day of the next term judgment, by default should be entered against her. Oswald v. New York (2 Dall., 415) was also an action at law brought originally in the Supreme Court. Suits in equity have been somewhat frequent. Grayson v. Virginia, 3 Dall., 320; Huger *et al.* v. South Carolina, *Id.*, 371; New York v. Connecticut, 4 Dall., 1; Cherokee Nation v. Georgia, 5 Pet., 1; New Jersey v. New York, *Id.*, 284; Rhode Island v. Massachusetts, 12 Pet., 657; s. c. 13 Pet., 23; 14 Pet., 210; 4 How., 591; Missouri v. Iowa, 7 How., 660; Florida v. Georgia, 17 How., 478; Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How., 421; Georgia v. Stanton, 6 Wall., 50; Texas v. White, 7 Wall., 700; Virginia v. West Virginia, 11 Wall., 39.

strict courts, when proceeding as courts of admiralty and maritime jurisdiction ; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, or where a State or an ambassador, or other public minister, or a consul or vice-consul, is a party." Section 689 provides that : "The trial of issues of fact in the Supreme Court, in all *actions at law* against citizens of the United States, shall be by jury;" and by section 716, authority is given to said court, as well as to the circuit and district courts, "to issue writs of *scire facias*," and to "issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law "

The inhibition contained in section 16 of the judiciary act of 1789 against the maintenance of *suits in equity*, where a plain, adequate and complete remedy may be had at law, and the provision in section 34 of the same act, to the effect that the laws of the several States, except where the CONSTITUTION, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials *at common law* in the courts of the United States in cases where they apply, are incorporated as sections 723 and 721 in the text of the revision.<sup>25</sup>

Many other provisions of the Revised Statutes, and of laws enacted subsequent to the revision, might be cited, in which the words "*controversies*," "*suits*," "*actions*," "*cases*" and "*causes*," as therein used, might with propriety be held to embrace remedies both legal and equitable. But our present object is accomplished by showing in a general way the manner in which the law-making power has seen fit, in conferring jurisdiction upon the courts, to distinguish, *eo nomine*, between law and equity. Not only then is this distinction recognized and perpetuated in the fundamental law, but it has been acknowledged and applied by the legislative department of the government, from its very first effort to establish and put into operation a judicial system,

<sup>25</sup> See Judiciary Act, sec. 16, *ante*, p. 18, and sec. 34, *ante*, p. 25.

down to the present time. The Supreme Court of the United States, too, very soon after its organization, had occasion to consider the subject, and one of the justices of that high tribunal expressed himself in very emphatic terms upon the importance of not confounding in their administration the principles of the respective systems of law and equity.<sup>26</sup>

<sup>26</sup>As early as 1799, in *Sims v. Irvine* (3 Dall., 425), which was ejectment from the circuit court of Pennsylvania, counsel for plaintiff in error contended that the title of the lessor of plaintiff was an equitable and not legal title, and that in the courts of the United States, recognizing the distinction between legal and equitable jurisdiction, the action could not be maintained. Ellsworth, Chief Justice, in delivering the opinion, stated that the plaintiff's right having become an *established legal right*, and having incorporated itself as such with property and tenures, it remained a legal right, notwithstanding any new distribution of judicial power, and must be regarded by the common law courts of the United States as a rule of decision. But Justice Iredell, though concurring in the judgment of the court, took occasion, in a separate opinion, to say that "if the title stand merely as an equitable one, he should be strongly inclined against it, if not deem it altogether insufficient;" adding "that," in his opinion, "it was of infinite moment that principles of law and equity should not be confounded, otherwise inextricable confusion would arise; neither would be properly understood, and, instead of both being administered with useful guards, which the policy of each system has devised against abuse, an heterogeneous mass of principles not intended to affort with each other would be blended together and the substance of justice would soon follow the forms calculated to secure it."

Since the above, perhaps the earliest utterance upon the subject down to the present time, the decisions of the Federal courts, recognizing and applying the distinction between law and equity, and tracing and explaining their relations to each other in matters of jurisdiction, pleading and practice, have been numerous.

FOR CASES HOLDING CERTAIN PLEADINGS, PRACTICE AND PROCEEDINGS IMPROPER ON THE LAW SIDE, BECAUSE PERTAINING TO THE EQUITY SIDE OF THE COURT, see *Wilbur v. Almy*, 12 How., 180; *Boyle v. Zacharie*, 6 Pet., 648; *Hukell v. Page*, 6 Biss., 183; *Sands v. Smith*, 1 Dill., 290; *Byrd v. Badger*, 1 McAllis., 443; *Leggett v. Cole*, 3 Fed. Rep., 332.

FOR CASES HOLDING CERTAIN PLEADINGS, PRACTICE AND PROCEEDINGS IMPROPER ON THE EQUITY SIDE, BECAUSE PERTAINING TO THE LAW SIDE OF THE COURT, see *Blease v. Garlington*, 92 U. S., 1; *Orchard v. Hughes*, 1 Wall., 73; *Noonan v. Lee*, 2 Black., 499; *Surgett v. Lapice*, 8 How., 48; *Knox v. Smith*, 4 How., 298; *McDonald v. Smalley*, 1 Pet., 620; *Nickerson v. A. T. & S. F. R. R. Co.*, 1 McCrary, 383, *Farmers L. & I. Co. v. C. R. R. Co.*, 2 Fed. Rep., 656; *Parish v. Ellis*, 16 Pet., 451.

FOR CASES CONDEMNING THE ATTEMPTS TO UNITE LEGAL AND EQUITABLE CLAIMS AND DEFENSES IN THE SAME SUIT, see *Hurt v. Hollingsworth*, 100 U. S., 100; *Basey v. Gallagher*, 20 Wall., 670; *Walker v. Dreeville*, 12 Wall., 440; *Dunphy v. Kleinsmith*, 11 Wall., 610; *Thomson v. R. R. Co.*, 6 Wall., 134; *Orchard v. Hughes*, 1 Wall., 73; *Farron v. Lcsson*, 1 Black, 309; *Jones v. McMasters*, 20 How., 8; *La Mothe Mfg.*

**§ 7. What is "Case" or "Suit" within Meaning of Constitution and Statutes.**—Referring to section 2 of article III. of the CONSTITUTION, which, as we have seen, extends the judicial power to "all cases in law and equity," that is to say, to "cases aris-

Co. v. Nat. Tube Works, 15 Blatch., 432; Fisk v. Union Pacific R. R. Co., 8 Blatch., 299; Shuford v. Cain, 1 Abb. U. S., 302; Kenton F. R. & Mfg. Co. v. McAlpin, 5 Fed. Rep., 737.

See, also, in this connection, criticisms on code pleading commingling law and equity, Green v. Custard, 23 How., 484; McFaul v. Ramsay, 20 How., 523; Stinson v. Donsman, 20 How., 461; and Randon v. Toby, 11 How., 493.

FOR CASES HOLDING THAT CERTAIN EQUITABLE RIGHTS AND CLAIMS COULD NOT BE ENFORCED ON THE LAW SIDE OF THE COURT, see Hanrick v. Barton, 16 Wall., 166; Shierburn v. DeCordova, 24 How., 423; Smith v. McCann, 24 How., 398; Hooper v. Scheiner, 23 How., 235; Fenn v. Holme, 21 How., 481; McCollum v. Eager, 2 How., 61; DeVaraigne v. Fox, 2 Blatchf., 95; Hall v. Mining Co., 1 Woods, 544; Balmear v. Otis, 4 Dill., 558; Loving v. Downs, 1 McAllis., 360. But see Mills v. Scott, 99 U. S. 25.

FOR CASES HOLDING THAT CERTAIN EQUITABLE DEFENSES COULD NOT BE SET UP ON THE LAW SIDE OF THE COURT, see Hurt v. Hollingsworth, 100 U. S., 100; Foster v. Mora, 98 U. S., 425; Greer v. Mezes, 24 How., 268; Jones v. McMasters, 20 How., 8; Watkins v. Holman, 16 Pet., 25; Bagnelle v. Broderick, 13 Pet., 436; Bank v. Dudley, 2 Pet., 492; Robinson v. Campbell, 3 Wheat., 212; Warren v. Emerson, 1 Curt., 239; Montejo v. Oliver, 14 Blatchf., 324; Rhoades v. Selim, 4 Wash. C. C., 715; Mezes v. Greer, 1 McAllis., 401; Wythe v. Smith, 4 Sawy., 17; Parsons v. Dennis, 7 Fed. Rep., 317.

FOR CASES HOLDING THAT CERTAIN LEGAL RIGHTS AND CLAIMS COULD NOT BE ENFORCED ON THE EQUITY SIDE OF THE COURT, see Smith v. R. R. Co., 99 U. S., 398; VanNorden v. Morton, 99 U. S. 378; Bowen v. Chase, 94 U. S., 812; Lewis v. Cocks, 23 Wall., 466; French v. Hay, 22 Wall., 231; Broderick's Will, 21 Wall., 503; Grand Chute v. Winegar, 15 Wall., 373; Ins. Co. v. Bailey, 13 Wall., 616; Dows v. City of Chicago, 11 Wall., 108; Wright v. Ellison, 1 Wall., 16; Parker v. W. L. C. & W. Co., 2 Black., 545; Hungerford v. Sigerson, 20 How., 156; Hipp v. Babin, 19 How., 271; Maginac v. Thompson, 15 How., 281; Sample v. Barnes, 14 How., 70; Knox v. Smith, 4 How., 298; Fowle v. Lawrason, 5 Pet., 495; Horsburg v. Baker, 1 Pet., 232; Smith v. McIver, 9 Wheat., 532; Russell v. Clark's Exrs., 7 Cr., 69; Shapley v. Rangely, 1 Wood. & M., 213; La Mothe Mfg. Co. v. Nat. Tube Works Co., 15 Blatchf., 432; Andrews v. Solomon, Pet. C. C., 356; Baker v. Biddle, Bald., 394; Speigle v. Meredith, 4 Biss., 120; Ins. Co. v. Stanchfield, 1 Dill., 424; LeRoy v. Wright, 4 Sawy., 530; Morley v. Thayer, 3 Fed. Rep., 737.

FOR CASES HOLDING CERTAIN TITLES, CLAIMS AND INTERESTS TO BE LEGAL, see Humentt v. Peyton, 102 U. S., 333; Parker v. W. L. C. & W. Co., 2 Black., 545; Bennett v. Butliworth, 11 How., 669; Clark v. Smith, 13 Pet., 195; Russell v. Clark's Executors, 7 Cr., 69.

ing under the CONSTITUTION, the laws of the United States, and treaties made, or which shall be made, under their authority," Mr. Chief Justice Marshall, speaking for the court, in the case of *Osborne v. Bank of U. S.*,<sup>27</sup> says: "This clause enables the judicial department

FOR CASES HOLDING CERTAIN TITLES, CLAIMS AND INTERESTS TO BE EQUITABLE, see *Case v. Beauregard*, 101 U. S., 688; *Foster v. Mora*, 98 U. S., 425; *Hanrick v. Barton*, 16 Wall., 166; *Payne v. Hook*, 7 Wall., 425; *Railroad Co. v. Howard*, 7 Wall., 392; *Slater v. Maxwell*, 6 Wall., 268; *Fitch v. Creighton*, 24 How., 159; *Hooper v. Scheimer*, 23 How., 235; *Barber v. Barber*, 21 How., 582; *Garrison v. Memphis Ins. Co.*, 19 How., 312; *Shields v. Thomas*, 18 How., 253; *Shelton v. Tiffin*, 6 How., 163; *Gaines v. Chew*, 2 How., 619; *Bagnelle v. Broderick*, 13 Pet., 436; *Miller v. Kerr*, 7 Wheat., 1; *Bodley v. Taylor*, 5 Cr., 191; *Fletcher v. Morey*, 2 Story, 555; *DeVauzaine v. Fox*, 2 Blatchf., 95; *Parsons v. Lyman*, 5 Blatchf., 170; *Con. M. Life Ins. Co. v. Home Ins. Co.*, 17 Blatchf., 142; *Young v. Porter*, 3 Woods's, 342; *Goshorn v. Alexander*, 2 Bond, 158; *Lanmon v. Clark*, 4 McLean, 18; *Cent. Pac. R. R. Co. v. Dyer*, 1 Sawy., 641; *Starr v. Stark*, 2 Sawy., 603; *Van Bokkelen v. Cook*, 5 Sawy., 587; *Chapmann v. Borer*, 1 Fed. Rep., 274; *Davis v. James*, 2 Fed. R., 618; *Howard v. Sheldon*, 5 Fed. Rep., 465.

FOR CASES HOLDING THAT WITH RESPECT TO CERTAIN MATTERS AND RIGHTS THE *remedy at law* WAS COMPLETE, AND THAT RESORT TO EQUITY WAS EITHER IMPROPER OR UNNECESSARY, see *Ewing v. City of St. Louis*, 5 Wall., 413; *Hungerford v. Sigerson*, 20 How., 156; *Gaines v. Nicholson*, 9 How., 356; *Dade v. Irwin*, 2 How., 383; *Parker v. W. L. C. & W. M. Co.*, 1 Cliff., 247; *Peters v. Prevost*, 1 Paine, 64; *Sayles v. R. F. & C. R. R. Co.*, 3 Hughes, 172; *Bark v. Labitut*, 1 Woods, 11; *Heine v. Levee Commissioners*, 1 Woods's, 246; *Featherman v. Louisiana State Seminary*, 2 Woods's, 71; *New Orleans v. Morris*, 3 Woods, 103; *Rogers v. Cincinnati*, 5 McLean, 337; *Speigle v. Meredith*, 4 Biss., 120; *Blakely v. Biscoe*, Hempt., 114; *Tilford v. Oakley*, Hempt., 197; *Roundtree v. McLain*, Hempt., 245; *Vaughn v. C. P. R. R. Co.*, 4 Sawy., 280.

FOR CASES HOLDING THAT WITH RESPECT TO CERTAIN MATTERS AND RIGHTS THAT *equitable relief* WOULD BE AFFORDED, NOTWITHSTANDING THE OBJECTION THAT THERE WAS A REMEDY AT LAW, see *Ivinson v. Hutton*, 98 U. S., 79; *Oelrichs v. Spain*, 15 Wall., 211; *May v. LeClaire*, 11 Wall., 217; *Jones v. Bolles*, 9 Wall., 364; *Morgan v. Beloit*, 7 Wall., 613; *Cocks v. Izard*, 7 Wall., 559; *R. R. Co. v. Howard*, 7 Wall., 392; *Sutherland*, 5 Wall., 74; *Barber v. Barber*, 21 How., 582; *Dodge v. Woolsey*, 18 Watson v. How., 331; *Wylie v. Cox*, 15 How., 415; *State of Penn. v. Wheeling Bridge Co.*, 13 How., 518; *Shelton v. Tiffin*, 6 How., 163; *Burton v. Smith*, 13 Pet., 464; *Boyce v. Grundy*, 3 Pet., 210; *U. S. v. Howland*, 4 Wheat., 108; *Graves v. Boston Mar. Ins. Co.*, 2 Cr., 419; *Bean v. Smith*, 2 Mason, 252; *Pratt v. Northam*, 5 Mason, 95; *Gordon v. Hobart*, 2 Sum., 401; *Gass v. Stinson*, 2 Sum., 453; *Mitchell v. G. W. M. Mfg. Co.*, 2 Story, 648; *Warner v. Daniels*, 1 W. and M., 90; *Pierpont v. Fowler*, 2 W. and M., 223; *Cropper v. Coburn*, 2 Curtis, 465; *Hunt v. Danforth*, 2

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<sup>27</sup> 9 Wheat., 738.

to receive jurisdiction to the full extent of the CONSTITUTION, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case," etc.

"A case in law or equity," say the same court, in a recent decision, "consists of the right of one party as well as of the other, and may properly be said to arise under the CONSTITUTION or a law of the United States whenever its correct decision depends upon the construction of either; that cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defense, of the party, in whole or in part, by whom they are asserted; that except in the cases of which this (the Supreme Court) is given by the CONSTITUTION original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and lastly, that it is not sufficient to exclude the judicial power of the United States from a particular case; that it involves questions which do not at all depend on the CONSTITUTION or laws of the United States; but, when a question to which the judicial power of the United States is extended by the CONSTITUTION forms an ingredient of the original cause, it is within the power of Congress

Curtis, 592; Gindrat v. Dane, 4 Cliff., 260; Plummer v. C. M. L. Ins. Co., 1 Holmes, 267; Bunce v. Gallagher, 5 Blatchf., 481; Brown v. P. M. Steamship Co., 5 Blatchf., 525; Harrison v. Rowan, 4 Wash. C. C., 202; Mayer v. Fonkrod, 4 Wash. C. C., 349; Wheeling v. Mayor, etc., 1 Hughes, 90; Harmanson v. Bain, 1 Hughes, 188; Braden v. Lee, 2 Hughes, 484; U. S. v. Myers, 2 Brock., 516; Gaines v. Mauseaux, 1 Woods's, 118; Noyes v. Willard, 1 Woods's, 187; Kilgour v. N. O. G. L. Co., 2 Woods's, 144; Benjamin v. Cavaroc, 2 Woods's, 168; Kimball v. County of Mobile, 3 Woods's, 555; Crane v. McCoy, 1 Bond., 422; Lorman v. Clark, 2 McLean, 568; Vallette v. W. & C. Co., 4 McLean, 192; Bicknell v. Todd, 5 McLean, 236; Morton v. Root, 2 Dill., 312; Bank v. Douglass County, 3 Dill., 298; U. P. R. R. Co. v. McShane, 3 Dill., 303; Tscheider v. Biddle, 4 Dill., 55; U. S. v. Parrott, 1 McAllis., 271; Frazer v. Colorado Dressing and Smelting Co., 5 Fed. Rep., 163; Perry v. Sharpe, 8 Fed. Rep., 15.

to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."<sup>28</sup>

It has been held that proceedings on the part of the government of the United States to condemn a site for a postoffice and other public buildings, was a suit at *common law*, within the meaning of the Judiciary Act of 1789.<sup>29</sup> And, in passing upon the right to remove a suit from a State to a Federal court, under the twelfth section of said act, it is said, in *West v. Aurora City*:<sup>30</sup> "A suit removable from a State

<sup>28</sup> *Railroad Company v. Mississippi*, 102 U. S. 135.

<sup>29</sup> *Kohl v. U. S.*, 91 U. S., 367. In this case it was contended on behalf of plaintiffs in error that the circuit court had no jurisdiction of the proceeding. The court, after admitting that there was nothing in the act of Congress of March, 1872, 17 Stats. at L., 79 (which gives authority to the Secretary of the Treasury to purchase the site), expressly authorizing a proceeding in the circuit court to secure it, or which directed the process by which the contemplated condemnation should be effected, seem to rest the question on the Judiciary Act of 1789. They say: "If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the circuit court. That it is a 'suit' admits of no question."

See also *U. S. v. Block*, 3 Biss., 208.

<sup>30</sup> 6 Wall., 139. The question in this case arose, as stated in the text, under the twelfth section of the Judiciary Act of 1789. (For full text of the section, see *ante*, p. 16.) It seems that under the code of Indiana a defendant might set forth, by his answer, as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he should have. *West et al.* brought suit in the State court of Indiana against the city of Aurora. The suit was for matured interest coupons on certain bonds.

To this suit the defendant seemed to have made defense by answer under the code, and subsequently to have filed, by leave of the court, as an additional answer, three paragraphs setting up new defensive matter, in each of which the defendant prayed an injunction to restrain the plaintiffs from further proceeding in any suit on the coupons or bonds and from transferring them to any third parties, and for a decree that the bonds be delivered up to be cancelled.

Upon the filing of these additional paragraphs the plaintiffs entered a discontinuance of their suit, and assuming that under the code the new paragraphs of the answer would remain in substance a new suit against them for the cause and object set forth in them, filed their petition for the removal of the cause into the circuit court of the United States. The petition was allowed by the State court, and the new paragraphs, without any other portion of the record of the suit in that court, except enough to show the title and the entry of discontinuance, were sent into the circuit court. By that court they were remanded to the State court as not constituting a suit that could be removed under the twelfth section of the judicial act.



court must be a suit regularly commenced by a citizen of the State in which the suit is brought, by process served upon a defendant who is a citizen of another State, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State court." One of the questions presented in the celebrated case of *Ex Parte Milligan*<sup>31</sup> was whether a petition for a writ of *habeas corpus* was a case within the meaning of the act of April 29, 1802. At the hearing of the cause in the circuit court, the judges were opposed in opinion, and certified the points of their disagreement to the Supreme Court of the United States. No writ had, in fact, been issued, and in answer to the contention that the proceeding had not ripened into a *cause*, the court say: "This we deny. It was the *cause* of Milligan when the petition was presented to the circuit court. It would have been the *cause* of both parties if the court had issued the writ, and brought those who held Milligan in custody before it. Webster defines the word 'cause' thus: 'A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right;' and he says, 'this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*; and action, from *ago*, to urge and drive.'

"In any legal sense, action, suit and cause are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his 'cause' or 'suit.' It was the only one by which he could recover his liberty. He was powerless to do more; he could

Upon the point in question, Mr. Chief Justice Chase, speaking for the court, remarked: "We think that the circuit court was clearly right in its action. The filing of the additional paragraphs did not make a new suit within the meaning of the Judicial Act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the code of Indiana, might give them, in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the State court. The right of removal is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a State court, who, by resorting to that jurisdiction, has become liable, under the State laws, to a cross-action."

<sup>31</sup> 4 Wall., 2.

neither instruct the judges nor control their action, and should not suffer because, without fault of his, they were unable to render a judgment. But the true meaning of the term 'suit' has been given by this court. One of the questions in *Weston v. City Council of Charleston*,<sup>32</sup> was whether a writ of prohibition was a suit, and Chief Justice Marshall says: 'The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him.' Certainly Milligan pursued the only remedy which the law afforded him.

"Again, in *Cohens v. Virginia*,<sup>33</sup> he says: 'In law language, a suit is the prosecution of some demand in a court of justice.' Also, 'To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit, is to continue that de-

<sup>32</sup> 2 Pet., 449. The question involved was whether the Supreme Court of the United States had jurisdiction to revise the judgment of the Constitutional Court of South Carolina in a prohibition case. This depended on the twenty-fifth section of the Judiciary Act, which provided "that a final judgment or decree in any suit in the highest court of *law or equity* of a State in which a decision in the suit could be had," etc. (For this section in full, see *ante*, p. 20.) In the course of his opinion, Mr. Chief Justice Marshall, for the court, says: "In this case the city ordinance of Charleston is the exercise of an 'authority under the State of South Carolina, the validity of which has been drawn in question on the ground of its being repugnant to the Constitution,' and 'the decision is in favor of its validity.' The question, therefore, which was decided by the constitutional court is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is *whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?*"

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals, and, in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a *suit*."

<sup>33</sup> 6 Wheat., 264.

mand.' When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes v. Jennison et al.*<sup>34</sup> was whether, under the twenty-fifth<sup>35</sup> section of the judiciary act, a proceeding for a writ of *habeas corpus* was a 'suit.' Chief Justice Taney held, that 'if a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty.'

In considering the cases or suits to which Federal jurisdiction extends, we are not to understand these terms as embracing only *actions at common law* or *suits in equity* in that narrow and technical sense which belongs to old and settled forms. It has been held, and, with but few exceptions,<sup>36</sup> such may be regarded as the established doctrine, that, whenever, either by statute or common law of a State a right of action has become fixed, and a legal liability has been incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of the parties.<sup>37</sup> And not-

<sup>34</sup> 14 Pet., 540.

<sup>35</sup> See section in full, *ante*, p. 20.

<sup>36</sup> Among the exceptions may be noted divorce cases (*Barber v. Barber*, 21 How., 582), and proceedings to probate wills. (*Gaines v. New Orleans*, 6 Wall., 642; *Fourvergne v. New Orleans*, 18 How., 470; *Tarver v. Tarver*, 9 Pet., 174; *Broderick's Will*, 21 Wall., 503; *Langdon v. Goddard*, 2 Story, 267; *Fuentes v. Gaines*, 1 Woods's, 112.)

<sup>37</sup> *Denuick v. Railroad Company*, 103 U. S., 11. In this case the plaintiff brought suit in the State Court of New York to recover damages for the death of her husband. The case was removed to the Circuit Court of the United States on the ground that the plaintiff was a citizen of New York and the defendant a corporation of New Jersey. The plaintiff introduced evidence to prove the negligence, whereupon the court ruled that for the death of her husband, which occurred in New Jersey, she could not, under the special statute of that State, recover in the action. Judgment for defendant. Writ of error sued out by plaintiff. The court, after announcing the general rule, stated: "The action in the present case is in the nature of trespass to the person, always held to be transitory and the venue immaterial. The local court in New York and the Circuit Court of the United States for the Northern District were competent to try such a case when the parties were properly before it;" citing *Mostyn v. Fabrigas*, 1 Cowp., 161; *Rafael v. Verelst*, 2 W. Bl., 983-1055; *McKenna v. Fisk*, 1 How., 241. "We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot

withstanding it has been strenuously urged that no action or suit could be maintained in the Federal courts except such as were, at the time of the adoption of the CONSTITUTION or the passage of the Judiciary Act of 1789, properly speaking, actions at common law or suits in equity, the contrary view has obtained.<sup>38</sup> Nor does it make any difference that the legislature of the State, under which the right or liability is asserted, gives exclusive jurisdiction to the State tribunals.<sup>39</sup> If the case or suit is one of which, under the CONSTITUTION and statutes of the United States, the Federal courts can take jurisdiction, they will not hesitate to exercise it, and administer, within the

escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else, because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced, or the wrongs of her citizens redressed, in no other State of the Union? The contrary has been held in many cases;" citing *Ex Parte Van Riper*, 20 Wend. (N. Y.), 614; *Lowry v. Inman*, 46 N. Y., 119; *Pickering v. Fisk*, 6 Vt., 102; *Railroad v. Sprayberry*, 8 Bax. (Tenn.), 341; *Great Western Railway Co. v. Miller*, 19 Mich., 305.

<sup>38</sup> *Ex Parte McNeil*, 13 Wall., 236; *Clark v. Smith*, 13 Pet., 195; *Bank v. Dudley*, 2 Pet., 492; *Parker v. Overman*, 18 How., 137; *Fitch v. Crighton*, 24 How., 159; *U. S. v. Block*, 3 Biss., 208; *Wheeler v. Bates*, 6 Biss., 88; *Ex Parte Biddle*, 2 Mason, 472; *Lorman v. Clark*, 2 McLean, 568; *Strachen v. Clyburn*, 3 McLean, 174; *Clark v. Schier*, 1 W. and M., 368; *Goshorn v. Alexander*, 2 Bond., 158; *Keith v. Rockingham*, 2 Fed. Rep., 834.

<sup>39</sup> *Railway Co. v. Whitton*, 13 Wall., 270; *Cowles v. Mercer County*, 7 Wall., 118; *Broderick's Will*, 21 Wall., 503; *Payne v. Hook*, 7 Wall., 425; *Snydam v. Broadnax*, 14 Pet., 67; *Robinson v. Campbell*, 3 Wheat., 212; *Watson v. Tarpley*, 18 How., 517; *Union Bank v. Jolly*, 18 How., 503; *Hyde v. Stoné*, 20 How., 170; *Wheeler v. Bates*, 6 Biss., 88; *Allen v. Allen*, 3 Wall., Jr., 284; *Parsons v. Lyman*, 5 Blatch., 170; *Mason v. Boom Co.*, 3 Wall., Jr., 252; *Phelps v. O'Brien County*, 2 Dill., 518; *Davis v. James*, 2 Fed. Rep., 618; *Chapman v. Borer*, 1 Fed. Rep., 274; *Cunningham v. County of Rawls*, 1 Fed. Rep., 453; *Holmes v. O. & C. Ry. Co.*, 5 Fed. Rep., 75.

It has been held that a State statute which abrogates all common-law remedies for the wrongful exclusion of a passenger from the cars of a railroad company is unconstitutional, so far as it relates to railroads running between two or more States, it being a regulation of inter-State commerce that the State has no power to make. *Brown v. Memphis & C. R. Co.*, 5 Fed. Rep., 499.

State in which they are sitting, the law of the case as if they were courts of such State.<sup>40</sup>

<sup>40</sup> Green v. Neal, 6 Pet., 291; Suydam v. Williamson, 20 How., 427; Hinde v. Vattier, 5 Pet., 398; Wilkinson v. Leland, 2 Pet., 627; Olcott v. Bynum, 17 Wall., 44; Slaughter v. Glenn, 98 U. S., 242.

## CHAPTER II.

### NATURE AND GENERAL PRINCIPLES OF FEDERAL JURISDICTION, AND OF THE JURISDICTION OF THE SEVERAL COURTS.

#### § 8. Preliminary Remarks—Jurisdiction Defined—Does not Extend to Political Questions—Duty of Court, etc.—

Before treating of the sources of legal and equitable rights, and of the differences in pleading and practice incident to their enforcement on the law and equity sides of the courts, it is desirable, if not essential, to consider the nature and general principles of Federal jurisdiction, and to classify and arrange under the heads of the several courts, the cases over which, with respect to *parties* and *subject matter*, they may take cognizance. And first it may be useful to have a correct idea of what is meant by jurisdiction. It has been defined as follows: "The power to hear and determine a cause is jurisdiction. It is *coram judice* whenever a case is presented which brings this power into action. If the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction, whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the *exercise of jurisdiction* conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."<sup>1</sup> In another case it is said "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit. To adjudicate or exercise any judicial power over them, the question is, whether, on the case before a court, their action is judicial or extra-judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties? If the law confers the power to render a judgment

<sup>1</sup> U. S. v. Arredondo, 6 Pet., 691.

or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing or determining it."<sup>2</sup> In connection with the above definitions, as applied to the Federal courts, it may be observed that, owing to the organization of the government into the three great departments: executive, legislative, and judicial, and to the assignment and limitation of the powers of each by the Constitution, it results that their jurisdiction does not extend to political questions.<sup>3</sup>

Every court must, of necessity, have the power to determine its own jurisdiction, and, when properly challenged in a given case, to enquire into the existence of the grounds or facts upon which it may depend. Such challenges always receive timely consideration in the Federal courts, deriving, as we shall see, their authority to take cognizance of every case that is brought before them from written law.<sup>4</sup> The duty of the court to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, is of equal obligation, and in passing upon a jurisdictional question, the Constitution and the law will be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.<sup>5</sup> "There is no rule of law or public policy," it is said, "which requires the national courts to discourage persons from seeking redress in those tribunals in every case where the Constitution and laws, fairly construed, will permit it."<sup>6</sup>

**§ 9. Jurisdiction Derived from the Constitution and Statutes.**—It may be stated, as a proposition of first importance,

<sup>2</sup> *Rhode Island v. Massachusetts*, 12 Pet., 657. The definitions in the text are quoted with approval in *Grignon v. Astor*, 2 How., 319, p. 338. See also *Forsythe v. Ballance*, 6 McLean, 562, p. 567; *In re Bogard*, 2 Sawy., 396, p. 401; and *Le Roy v. Clayton*, 2 Sawy., 493, p. 499.

<sup>3</sup> *Georgia v. Stanton*, 6 Wall., 50; *Cherokee Nation v. Georgia*, 5 Pet., 1;

<sup>4</sup> See section 9, *infra*. As to time and manner in which jurisdiction may be questioned, see note 11, *infra*.

<sup>5</sup> *U. S. v. Devaux*, 5 Cranch., 61.

<sup>6</sup> *Newby v. Oregon Cen. R. R. Co.*, 1 Sawy., 63.

that the courts of the United States have no jurisdiction, except such as is derived from, or conferred by, the CONSTITUTION and the statutes of the United States enacted in pursuance thereof.

In the case of *Ex Parte Bollman and Swartwout*,<sup>7</sup> which was an application to the Supreme Court for a writ of *habeas corpus ad subjiciendum*, Mr. Chief Justice Marshall, delivering the opinion of the court, commences by saying : "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the CONSTITUTION, or by the laws of the United States. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court ; and, with the decisions heretofore rendered on this point, no member of the bench has even for an instant been dissatisfied. The reasoning from the bar in relation to it may be answered by the single observation that, for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law ; but the power to award the writ by any of the courts of the United States must be given by written law."

"This opinion," continues the distinguished Chief Justice, "is not to be considered as abridging the power of courts over their own officers, or to protect themselves and their members from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals. To enable the court to decide on such question, the power to determine it must be given by written law. The inquiry, therefore, on this motion, will be whether, by any statute compatible with the CONSTITUTION of the United States, the power to award a writ of *habeas corpus* in such a

<sup>7</sup> 4 Cranch., 75.



case as that of Erick Bollman and Samuel Swartwout has been given to this court."

In *Rhode Island v. Massachusetts*,<sup>8</sup> which was a case of original jurisdiction in the Supreme Court, the want of analogy between a plea to the jurisdiction of a court of common law or equity in England, where the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them, and of a motion to dismiss a cause pending in one of the courts of the United States for lack of jurisdiction, is clearly pointed out. It is there said: "As a denial of jurisdiction over the subject matter of a suit between parties within the realm, over which and whom the court has power

<sup>8</sup> 12 Pet., 657. In this case a bill was filed by the State of Rhode Island against the State of Massachusetts to ascertain and establish the northern boundary between the States, etc. The question of jurisdiction was raised on a motion to dismiss, which was overruled. In *Scott v. Sandford*, 19 How., 393, it is said by Mr. Chief Justice Taney, referring to the different principles and laws which govern questions of jurisdiction when raised in the courts of the United States: "This difference arises, as we have said, from the peculiar character of the government of the United States. Although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined, and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the circuit court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common-law, English or State court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution, to hear and determine the case. And if the plaintiff claims a right to sue in a circuit court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States; and he cannot maintain his suit without showing that fact in the pleadings."

to act, cannot be successful in an English court of general jurisdiction, a motion like the present" (which was a motion to dismiss a bill in equity) "could not be sustained consistently with the principles of its constitution. But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the CONSTITUTION and laws have authorized it to act. Any proceeding without the limits prescribed is *coram non judice*, and its action a nullity."

In another case this language is used: "The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."<sup>9</sup>

<sup>9</sup> *Cary v. Curtis*, 3 How.. 236. Whilst spoken of *eo nomine*, as we have seen, both in the Constitution and statutes of the United States, yet strictly speaking, as conferring jurisdiction, the COMMON LAW is without force. There is no such thing as a national common law, which, *ex vi termini*, gives jurisdiction to the Federal courts. Neither by the Constitution nor by congressional enactment has the *common law* been made a part of Federal jurisprudence, or declared to be a source of jurisdictional authority. That Congress could do this seems to be conceded (see *Wheaton v. Peters*, 8 Pet., 658); but until it is done, and then only to the extent that it may be imparted, can the Federal courts, either in civil or criminal cases, exercise, in a legitimate sense, what may be called common-law jurisdiction. It is true the courts of the United States often refer to and are guided by the principles and definitions of the common law. As for instance, with respect to the common-law rule of evidence for the proof of signature by the comparrison of handwriting, in an appeal from the Court of Claims to the Supreme Court of the United States (*Moore v. United States*, 91 U. S., 270), Mr. Justice Bradley, by whom the opinion of the court is delivered, says: "The question is, by what law is the court of claims to be governed in this respect? May it adopt its own rules of evidence, or is it to be governed by some system of law? In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the common law. Cases involving the principles of the civil law are the exceptions. We think that where Congress has not provided, and no special reason demands, a different rule, the rules of evidence as found in the common law ought to govern the action of the Court of Claims. If a more liberal rule is desirable, it is for Congress to declare it by a proper enactment." Mr. Justice Story, in *United States v. Coolidge*, 1 Gallis, 488, says: "Whether the

In speaking of the difficulty of defining the extent and limits of judicial power in admiralty cases, Mr. Chief Justice Taney says: "This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty

common law of England, in its broadest sense, including equity and admiralty, as well as legal doctrines, be the common law of the United States or not, it can hardly be doubted that the Constitution and laws of the United States are predicated upon the existence of the common law." And in *Lynch v. Clark*, 1 Sandf., 583, Mr. Vice-Chancellor Sandford is reported as follows upon this subject: "In my judgment there is no room for doubt, but that, to a limited extent, the common law (or the principles of the common law, as some prefer to express the doctrine) prevails in the United States as a system of national jurisprudence. To what extent it is applicable, I need not hazard an opinion, either in general terms or in particular instances, beyond the case in hand; but it seems to be a necessary consequence, from the laws and jurisprudence of the Colonies and of the United States under the articles of confederation, that in a matter which, by the Union, has become a national subject, to be controlled by a principle co-extensive with the United States, in the absence of constitutional or congressional provision on the subject, it must be regulated by the principles of the common law, if they are pertinent and applicable." But see *People v. Folsom*, 5 Cal., 374.

But, notwithstanding what is said above, it may be safely stated, as a general rule, that in the assertion of common-law rights in civil cases the Federal courts look to the law of the State in which the controversy originated. *Wheaton & Donaldson v. Peters & Gregg*, 8 Pet., 591. This case involved the copyright of Mr. Wheaton to twelve volumes of the reports of the Supreme Court of the United States, known as "Wheaton's Reports," and one of the grounds upon which it was sought to support the right, was the common law. Mr. Justice McLean, in delivering the opinion of the court, says: "But, if the common-law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country. It is clear there can be no common law of the United States. The Federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption. When, therefore, a common-law right is asserted we must look to the State in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the District Court of Pennsylvania for the first volume of the book in controversy, and it was published in that State, we may inquire whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania. It is insisted that our ancestors, when they migrated to this country, brought with them the English common law, as part of their heritage. That this was the case, to a limited extent, is admitted. No one will contend that the common law, as it existed in England, has ever been in force in all its provisions in any

are exercised by the United States and a State independently of each other, within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix, with pre-

State in this Union. It was adopted so far only as its principles were suited to the conditions of the colonies, and from this circumstance we see what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective States must determine how far the common law has been introduced and sanctioned in each." See also *Kendall v. United States*, 12 Pet., 524; *Van Ness v. Pacard*, 2 Pet., 137; *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How., 518; *United States v. Eckford*, 6 Wall., 484; *Scott v. Bynum*, 17 Wall., 44; *Lorman, et al. v. Clark*, 2 McL., 568; *United States v. Garlinghouse*, 4 Ben., 194.

The question of whether or not the Federal courts can exercise a common-law jurisdiction in criminal cases was raised soon after the organization of the government, and was the subject of very earnest discussion and of conflicting opinions in the several circuits. At its February term, 1812, it was squarely presented to the Supreme Court (*United States v. Hudson and Goodwin*, 7 Cranch., 32), and the existence of such power denied, and, so far as disclosed by the report, by an unanimous court. It was a case certified from the circuit court for the district of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the President and Congress of the United States, contained in the *Connecticut Current* of the seventh of May, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain, the judges of that court were divided in opinion whether the Circuit Court of the United States had a common-law jurisdiction in cases of libel. Mr. Justice Johnson, in delivering the opinion of the court, said: "The only question which this case presents is whether the circuit courts of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly, because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute. Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case, for many years, has this jurisdiction been asserted, and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions. That power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts, created by the general government, possess no jurisdiction but what is given them by the power that creates

cision, its definite boundaries; but certainly no State law can enlarge it, nor can an act of Congress, or a rule of court, make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construc-

tion, and can be vested with none but what the power ceded to the general government will authorize them to confer. It is not necessary to inquire whether the general government in any, and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present. It is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation. And such is the opinion of a majority of this court. For the power which Congress possesses to create courts of inferior jurisdiction necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction much more extended; in its nature very indefinite; applicable to a great variety of subjects; varying in every State in the Union, and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district. The only ground on which it has ever been contended that this jurisdiction could be maintained is, that upon the formation of any political body, an implied power to preserve its own existence, and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our Constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England. But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general government it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence."

At its subsequent term, 1816, when, in *U. S. v. Coolidge*, 1 Wheat., 415, the same question again came up, several members of the court expressed a willingness or desire to hear argument on the point, but the Attorney-General Mr. Richard Rush, declining to argue it, and no counsel appearing for the defendant, the former opinion was adhered to and is now the settled law.

In *U. S. v. Hall*, 98 U. S., 343, it is said, citing, with approval, the cases of *U. S. v. Hudson*, and *U. S. v. Coolidge*, *supra*, that such courts (referring to the circuit and district courts) "possess no jurisdiction over crimes and offences committed against the authority of the United States, except what is given to them by the power that created them; nor can they be invested with any such jurisdiction beyond what the power ceded to the United States by the Constitution authorizes Congress to confer;

tion of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government."<sup>10</sup>

Without extending these citations, it may, we think, be accepted as axiomatic in Federal jurisprudence, that, with respect to the jurisdiction of the Federal courts, no presumptions are indulged; that the facts upon which the jurisdiction rests must, in some form, appear with sufficient clearness in the record of all suits prosecuted before them.<sup>11</sup>

from which it follows that before an offence can become cognizable in the circuit court, the Congress must first define or recognize it as such and affix a punishment to it, and confer jurisdiction upon some court to try the offender."

See also *State of Pennsylvania v. Wheeling Bridge Co.*, *et al.*, 13 How., 518. In this case the court said: "It is admitted that the Federal courts have no jurisdiction of common-law offences, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction."

In *United States v. The New Bedford Bridge*, 1 Wood. and M., 401, which was an indictment in the United States Circuit Court for obstructing the navigation of a river, Mr. Justice Woodbury delivered an able and elaborate opinion, which the reader desiring to pursue the subject farther, can consult with profit. Amongst other things he, says: "And, however, courts may properly resort to the common law to aid in giving construction to words used in that Constitution and those laws (*United States v. Palmer*, 3 Wheat., 610, *e. g.*, 'robbery'), the body of the common law, as such, does not alone give jurisdiction in any case and enable the court to declare any acts to be offences under the United States, and to try them, where the Constitution and the acts of Congress have been silent concerning them."

See also *U. S. v. Martin*, 4 Cliff., 156; *U. S. v. Coppersmith*, 4 Fed. Rep., 198; *U. S. v. Walsh*, 5 Dill., 58; *U. S. v. Barney*, 5 Blatchf., 294.

<sup>10</sup> *The Steamer Lawrence*, 1 Black., 522. See also, as to necessity of deriving jurisdiction from Constitution and statutes, *Turner v. Bank of North America*, 4 Dall., 8; *Bank of U. S. v. Deveaux*, 5 Cranch., 61; *U. S. v. Peters*, 5 Cranch., 115; *Martin v. Hunter*, 1 Wheat., 304; *McCornick v. Sullivan*, 10 Wheat., 192; *U. S. v. Nourse*, 6 Pet., 470; *Sheldon v. Sill*, 8 How., 441; *Fontain v. Ravenel*, 17 How., 369; *Scott v. Sandford*, 19 How., 393; *Barber v. Barber*, 21 How., 582; *Daniels v. Railroad Company*, 3 Wall., 250; *Insurance Company v. Ritchie*, 5 Wall., 541; *U. S. v. Eckford*, 6 Wall., 484; *Assessors v. Osbornes*, 9 Wall., 567; *Railway Company v. Whitton*, 13 Wall., 270; *Sewing Machine case*, 18 Wall., 553 (p. 577); *U. S. v. New Bedford Bridge*, 1 Wood. and M., 401; *Loving v. Marsh*, 2 Cliff., 469; *Livingston v. Van Ingen*, 1 Paine, 45; *Hubbard v. Northern Railroad Company*, 3 Blatchf., 84; *Ex Parte Cabrera*, 1 Wash. C. C., 232; *Baker v. Biddle*, Bald., 394; *Livingston v. Jefferson*, 1 Brock., 203; *Lorman v. Clark*, 2 McLean, 568; *Karahoo v. Adams*, 1 Dill., 344; *Harrison v. Hadley*, 2 Dill., 229; *U. S. v. Alberty*, Hamps., 444.

<sup>11</sup> In *Robertson v. Cease*, 97 U. S., 646, it was argued that since the adoption of

And, further, that the Federal courts, in a proper sense, have no inherent national common law jurisdiction,<sup>12</sup> and that the laws of the several States cannot confer, enlarge, or diminish their jurisdiction.<sup>13</sup> It is true, as we have already seen, State laws may be the foundation

the fourteenth amendment of the Constitution, declaring all persons born or naturalized in the United States, and subject to the jurisdiction thereof, to be citizens of the United States and of the States where they reside, a mere allegation of residence in a State made such a *prima facie* case of citizenship as, in the absence of proof, was sufficient to sustain the jurisdiction of the court; that a resident of one of the States is *prima facie* either a citizen of the United States or an alien; if a citizen of the United States, and also a resident of one of the States, he is, by the terms of said amendment, a citizen of the State wherein he resides; and, if an alien, is entitled, in that capacity, to sue in the Federal courts, without regard to residence in any particular State. The court, while admitting that there was some force in this view, said: "*As the jurisdiction of the circuit court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the fourteenth amendment, is that a cause is without its jurisdiction unless the contrary affirmatively appears.* In cases where the jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which, in legal intentment, constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record."

As to necessity of setting out in pleadings jurisdictional facts, see *Ex Parte Smith*, 94 U. S., 455; *Mossman v. Higginson*, 4 Dall., 12; *McIntire v. Wood*, 7 Cranch., 504; *Breithaupt v. Bank of Georgia*, 1 Pet., 238; *Jackson v. Twentyman*, 2 Pet., 136; *Kendall v. U. S.*, 12 Pet., 524; *Dodge v. Perkins*, 4 Mason, 435; *Wood v. Maun*, 1 Sum., 578; *Bobyshall v. Openheimer*, 4 Wash., 482; *Findlay v. Bank of United States*, 2 McLean, 44; *Leavett v. Cowles*, 2 McLean, 491; *Dowell v. Griswold*, 5 Sawy., 39; *In Re Meador*, 1 Abb. U. S., 317.

If the facts upon which the jurisdiction rests fairly appear in the pleadings this will be sufficient. *Gassies v. Ballou*, 6 Pet., 761; *Marshall v. Baltimore and Ohio Railroad Company*, 16 How., 314; *Express Company v. Kountze*, 8 Wall., 342; *Jones v. Andrews*, 10 Wall., 327; *Berlin v. Jones*, 1 Woods's, 638; *Culver v. County of Crawford*, 4 Dill., 239; *U. S. v. Alberty, Hems.*, 444.

<sup>12</sup> See *ante*, note 9, p. 42.

<sup>13</sup> The local laws of a State, says Story, J., in delivering the opinion of the court in *Steamboat Orleans v. Phœbus*, 11 Pet., 175, "can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and then assist in the administration of the proper remedies where the jurisdiction is vested by the laws of the United States."

See also *Ex Parte McNeil*, 13 Wall., 236; *Railway Company v. Whitton*, 13 Wall., 270; *Hyde v. Stone*, 20 How., 170; *Union Bank v. Jolly*, 18 How., 503; *Snydam v. Broadnax*, 14 Pet., 67; *Payne v. Hook*, 7 Wall., 425; *Fitch v. Creighton*, 24 How., 159; *U. S. v. Drennen, Hems.*, 320; *National Bank v. Sebastian County*, 5 Dill.,

of legal and equitable rights, which will be recognized and enforced as effectually in the Federal as in the local tribunals of the State;<sup>14</sup> and that in the determination of cases, both civil and criminal, arising under the CONSTITUTION and laws of the United States, as well as those originating in the several States, the courts of the United States have always felt themselves at liberty to resort to the principles and definitions of the common law for their guidance;<sup>15</sup> but those who would

414; *Cunningham v. County of Ralls*, 1 McCreary, 117; *Davis v. James*, 2 Fed. Rep., 618; *Keith v. Town of Rockingham*, 2 Fed. Rep., 834. See also note 39, *ante*, p. 36.

<sup>14</sup> See note 40, *ante*, p. 37. See also *The St. Lawrence*, 1 Black., 522; *The General Smith*, 4 Wheat., 438; *Peyroux v. Howard*, 7 Pet., 324; *The John Farron*, 14 Blatchf., 24; *Wilkinson v. Leland*, 2 Pet., 627; *Olcott v. Bynum*, 17 Wall., 44; *Slaughter v. Glenn*, 98 U. S., 242.

<sup>15</sup> See note 9, *ante*, p. 42. In this connection it may be well to add that *common law*, in relation to Federal jurisprudence, means the *common law of England*, and not of any particular State. *Robinson v. Campbell*, 3 Wheat., 212. See also remarks of Mr. Justice Story, *ante*, pp. 5 and 6, taken from *Parson v. Bedford*, 3 Pet., 433, to the effect that the term common law, as used in the seventh amendment of the Constitution, is held in a just sense to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume, to settle legal rights. See also *Parish v. Ellis*, 16 Pet., 451; *Hipp v. Babin*, 19 How., 271; *Irvine v. Marshall*, 20 How., 558; *Fenn v. Holme*, 21 How., 481; *Lewis v. Cocks*, 23 Wall., 466. See definitions of common law, 1 Kent., 514. Bouvier's L. D.: "'Common Law.'—Common law is sometimes used in contradistinction to statute law. *Levy v. McCartee*, 6 Pet., 102." The expression "trials at common law" has been held not to include criminal cases or cases in equity (*U. S. v. Reid*, 12 How., 361; *McFarlane v. Griffith*, 4 Wash. C. C., 585; *Neves v. Scott*, 13 How., 268; *Blanchard v. Sprague*, 1 Cliff, 288), nor to include cases in admiralty. *The Independence*, 2 Curtis, 350.

Statutes passed in England, before the emigration of our ancestors, which were in amendment of the law, and which were applicable to our situation, constitute a part of the common law. *Patterson v. Winn*, 5 Pet., 233; *Carthart v. Robinson*, 5 Pet., 264; *Tayloe v. Thompson*, 5 Pet., 358; *U. S. v. Shepard*, 1 Abb. U. S., 431. Whilst the Federal courts, as we shall hereafter see, feel themselves bound, in many instances, to follow the decisions of the State courts, they except cases which are to be determined by the application of common law rules alone. *Chicago City v. Robins*, 2 Black., 418; *Foxcroft v. Millett*, 4 How., 353; *Township of Pine Grove v. Talcott*, 19 Wall., 666.

Where the common law is inapplicable to our institutions and situation, it will not, either in cases arising under the Constitution and laws of the United States or originating in a State which has adopted the common law, be looked to as a guide. *Van Ness v. Packard*, 2 Pet., 137; *Wheaton v. Peters*, 8 Pet., 591; *Kendall v. U. S.*, 12 Pet., 524.



invoke their jurisdiction in a given case, must be able, whether the question be raised by plea, or otherwise properly brought to the notice of the court, to put their finger on that provision of the CONSTITUTION or statutes which gives such jurisdiction.<sup>16</sup> We do not mean always in express terms, for the language employed may necessarily imply jurisdiction; nor do we mean that authority must be found for the exercise of those incidental powers which belong to all courts of justice. Consent of parties to a suit cannot give jurisdiction;<sup>17</sup> though transfers of title for the ex-

<sup>16</sup> In a case of error or appeal to the Supreme Court, if the want of jurisdiction is patent or can be readily ascertained by an examination of the record, the court will entertain and act on a motion to dismiss for want of jurisdiction, before hearing argument on the merits. *Seiple v. Hagar*, 4 Wall., 431; *Mooreland v. Page*, 20 How., 522; *Beers v. State of Arkansas*, 20 How., 527.

In *Coal Company v. Blatchford*, 11 Wall., 172, it is held that when the defect of jurisdiction, dependent upon citizenship, is apparent on the bill in equity, such defect may be taken advantage of on demurer, or without demurer on motion, at any stage of the proceedings, and that a plea in abatement is required only when the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. See, generally, as to mode of taking advantage of defect of jurisdiction, *Van Antwerp v. Hulburd*, 7 Blatchf., 426; *Halsey v. Hurd*, 6 McLean, 14; *Kelland v. The Cassius*, 2 Dall., 365; *Donaldson v. Hazen*, Hamps., 423; *D'Wolf v. Rabaud*, 1 Pet., 476; *Evans v. Davenport*, 4 McLean, 574; *Evans v. Gee*, 11 Pet., 80; *DeSobry v. Nicholson*, 3 Wall., 420; *Smith v. Kernochen*, 7 How., 198; *Mail Company v. Flanders*, 12 Wall., 130; *Pond v. Vermont Valley Bank Company*, 12 Blatchf., 280; *Rateau v. Bernard*, 3 Blatchf., 244; *Speigle v. Meredith*, 4 Biss., 120; *Wood v. Mann*, 1 Sum., 578; *Nesmith v. Calvert*, 1 Wood. and M., 34; *Varner v. West*, 1 Woods's, 493; *Vose v. Reed*, 1 Woods's, 647; *Wickliffe v. Owings*, 17 How., 47; *Rhode Island v. Massachusetts*, 12 Pet., 657; *Wicks v. The Samuel Strong*, 6 McLean, 587; *Heriott v. Davis*, 2 Wood. and M., 229; *Ward v. Thompson*, Newb., 95; *Eberly v. Moore*, 24 How., 147; *The Abby*, 1 Mason, 360; *Carter v. Bennett*, 15 How., 354; *Scott v. Sandford*, 19 How., 393; *Skilern v. May*, 6 Cranch., 267.

<sup>17</sup> *Ballance v. Forsyth*, 21 How., 389; *Sampson v. Welsh*, 24 How., 207; *Kelsey v. Forsyth*, 21 How., 85; *Montgomery v. Anderson*, 21 How., 386; *Minor v. Tillotson*, 2 How., 392; *Scott v. Sandford*, 19 How., 393; *Mills v. Brown*, 16 Pet., 525; *Bobyshall v. Openheimer*, 4 Wash., 482; *Ketchum v. Farmers' Loan and Trust Company*, 4 McLean, 1.

But parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission. *Railway Company v. Ramsey*, 22 Wall., 322. It seems that in this case the records of the court below were destroyed by fire, and a joint admission was made by the parties to the effect that the cause

press purpose of enabling suits to be brought in the Federal courts, provided such transfers are *bona fide* and not merely colorable, are sustained.<sup>18</sup> And so will a *bona fide* change of residence for the purpose of acquiring a new citizenship, so as to enable parties to invoke jurisdiction, be held good.<sup>19</sup> Jurisdiction, once rightfully acquired of the parties and subject matter, will be retained and made effectual for complete relief,<sup>20</sup> and a change of the status of the parties,<sup>21</sup> or, it seems, transfer of their interest after suit brought, will not oust or defeat jurisdiction.<sup>22</sup>

**§ 10. How Vested and Distributed.**—We have already given, in full, section 2 of Article III. of the CONSTITUTION,<sup>23</sup> extending the judicial power to all cases in law and equity arising under the

was transferred to the circuit court from a State court, and that the evidence of the transfer was once among the destroyed files. "The fair presumption from this is," say the court, "that there had been on the files in the cause everything which the statute required to be there to complete the transfer, and that the appearance and admission of the parties was expected and intended to have all the force and effect which a restoration of the papers could have."

<sup>18</sup> *Barney v. Baltimore City*, 6 Wall., 280; *McDonald v. Smalle*, 1 Pet., 620; *Osbone v. The Brooklyn City Railroad Company*, 5 Blatch., 366; *Foote v. Town of Hancock*, 15 Blatchf., 343; *DeLaveaga v. Williams*, 5 Sawy., 573; *Hoyt v. Wright*, 4 Fed. Rep., 168. The removal, if real and not merely nominal, of a citizen from one State to another, in order to be able to prosecute a suit in the Federal court, will also be sustained. *Cooper v. Galbraith*, 3 Wash., 546; *Briggs v. French*, 2 Sum., 251; *Castor v. Mitchell*, 4 Wash., 191; *Catlett v. Pacific Insurance Company*, 1 Paine, 594; *Jones v. League*, 18 How., 76; *Case v. Clarke*, 5 Mason, 70; *Rice v. Houston*, 13 Wall., 66.

<sup>19</sup> *Rice v. Houston*, 13 Wall., 66; *Briggs v. French*, 2 Sum., 251; *Case v. Clarke*, 5 Mason, 70; *Jones v. League*, 18 How., 76; *Cooper v. Galbraith*, 3 Wash., 546; *Shelton v. Tiffin*, 6 How., 163; *Catlett v. Pacific Insurance Company*, 1 Paine, 594; *Castor v. Mitchell*, 4 Wash., 191; *Gardner v. Sharp*, 4 Wash., 609; *Butler v. Farnsworth*, 4 Wash., 101; *Read v. Bertrand*, 4 Wash., 514.

<sup>20</sup> *Ober v. Gallagher*, 93 U. S., 199.

<sup>21</sup> *Morgan v. Morgan*, 2 Wheat., 290; *Mollan v. Torrence*, 9 Wheat., 537; *Dunn v. Clarke*, 8 Pet., 1; *Connolly v. Taylor*, 2 Pet., 556; *Thomas v. Newton*, Pet. C. C., 444; *Clarke v. Mathewson*, 12 Pet., 164; *Whyte v. Gibbs*, 20 How., 541; *Hatfield v. Bushnell*, 1 Blatchf., 393; *Trigg v. Conway*, Hamps., 711; *Hatch v. Dorr*, 4 McLean, 112; *Reilly v. Golding*, 10 Wall., 56.

<sup>22</sup> *Thomas v. Newton*, Pet. C. C., 444; *Mechanics' Bank v. Seton*, 1 Pet., 299; *Roberts v. Nelson*, 8 Blatch., 74.

<sup>23</sup> See *ante*, p. 2.

CONSTITUTION, the laws of the United States, to treaties made, or which should be made, under their authority ; to cases affecting ambassadors, and other public ministers and consuls; to cases of admiralty; to cases to which the United States should be a party; to controversies between States; between citizens of different States, and between citizens of the same States claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects. In connection therewith other provisions of the fundamental law should be considered.

In section 1 of the same article (article III.) it is declared : "THE JUDICIAL POWER OF THE UNITED STATES SHALL BE VESTED IN ONE SUPREME COURT, AND IN SUCH INFERIOR COURTS AS THE CONGRESS MAY, FROM TIME TO TIME, ORDAIN AND ESTABLISH."

And, in clause 2 (same section), it is provided : "IN ALL CASES AFFECTING AMBASSADORS, OTHER PUBLIC MINISTERS AND CONSULS, AND THOSE IN WHICH A STATE SHALL BE A PARTY, THE SUPREME COURT SHALL HAVE ORIGINAL JURISDICTION. IN ALL THE OTHER CASES BEFORE MENTIONED (*i. e.*, the cases mentioned in clause 1 of same section) THE SUPREME COURT SHALL HAVE APPELLATE JURISDICTION BOTH AS TO LAW AND FACT, WITH SUCH EXCEPTIONS AND UNDER SUCH REGULATIONS AS THE CONGRESS SHALL MAKE."

Perhaps no single sentence in the CONSTITUTION more highly attests the wisdom and great forecast of its authors than that which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." Its brevity, simplicity, and comprehensiveness make it a very model of organic law. And, notwithstanding our marvelous increase in population and wealth, and corresponding increase in amount and importance of business for the courts, no change, so far as the investment of judicial power is concerned, has been found necessary.<sup>24</sup> The Supreme Court is not only

<sup>24</sup> Had the Federal convention, as has been the case with nearly all State constitutional conventions, entered into details of legislation, and attempted to create and name all the courts, and define, with rigid precision, the jurisdiction of each, the

the only court mentioned in the Constitution, but is the only court which derives jurisdiction directly from that instrument. In 1792, without the aid of any further legislation than the Judiciary Act, it exercised original jurisdiction,<sup>25</sup> and it may be regarded as settled

result would have been repeated changes in the fundamental law. Every year or two a constitutional convention is held in some one of the States, and one of the main grounds generally urged for its assembling is to repair and patch up a judiciary system, which has been found unsuited to the condition and inadequate to the wants of the people. A moments' glance at the changes, since the organization of the courts in 1789, will convince us of the great wisdom of providing a system sufficiently flexible to meet all increasing demands and exigencies without the necessity of a change in the system itself.

The Supreme Court was organized to consist of a chief justice and five associate justices (section 1, Judiciary Act, *ante*, p. 11). From its first session, which was held at New York, February, 1790, down to its February term, 1815, making a quarter of a century, it delivered opinions, as shown by the reports, in about 443 cases. According to the report of the Attorney-General of the United States, of date December 1, 1879, and, notwithstanding the fact that about four years previous thereto the disputed value to authorize an appeal had been increased from two to five thousand dollars, there stood upon the docket of the current term, up to November 20, 1879, ten original and one thousand and eighty appellate cases. Under the Judiciary Act (sections 2 and 3, *ante*, pp. 10, 11) the United States were divided into thirteen districts, and a district judge provided for each. These thirteen districts (see section 4 of said act, *ante*, p. 11), except Maine and Kentucky, which were given circuit court powers, were divided into three circuits, as follows: The districts of New Hampshire, Massachusetts, Connecticut and New York constituted the eastern circuit; the districts of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, the middle; and the districts of South Carolina and Georgia, the southern circuit. The circuit courts consisted of two justices of the Supreme Court and the district judge of the district, any two of whom should constitute a quorum.

The whole judicial force, under the Judiciary Act, consisted of six supreme and thirteen district judges. Now we have one chief justice and eight associate justices on the supreme bench; nine circuits, with a circuit judge for each; fifty-nine districts, with a district judge for each; and a Court of Claims, with a chief justice and four associate justices, making in all seventy-three judges, as against nineteen when the courts were first organized. District courts are now held at not less than 123 different places, and circuit courts at about one-third less.

According to the report of the Attorney-General, above referred to, the number of civil suits, to which the United States was a party, pending in the circuit and district courts July 1, 1879, with the number terminated during the fiscal year ending

<sup>25</sup> *Georgia v. Brailsford*, 2 Dall., 402 and 415; *Chisholm v. Georgia*, 2 Dall., 419. See also *Florida v. Georgia*, 17 How., 478; *New Jersey v. New York*, 5 Pet., 284; *Kentucky v. Dennison*, 24 How., 266; *United States v. Hudson*, 7 Cranch., 32; *Rhode Island v. Massachusetts*, 12 Pet., 657.

that this jurisdiction cannot be added to by Congress so as to extend it over parties and controversies not enumerated in the CONSTITUTION;<sup>26</sup> nor can it be taken away, although it has been held that the grant of original jurisdiction over a certain subject matter does not make such jurisdiction necessarily exclusive.<sup>27</sup>

The appellate, unlike the original powers of the Supreme Court, can be exercised only in such cases and in such manner as Congress may see fit to prescribe.<sup>28</sup>

All courts, inferior to the Supreme Court, are creatures of statute. Their establishment, and, within CONSTITUTIONAL limits, their jurisdiction and the manner of its exercise, is left wholly to the discretion of Congress.<sup>29</sup>

The courts, inferior to the Supreme Court, which Congress has created, are the Circuit and District Court, and Court of Claims. The

June 30, 1879, was 4786; the number of civil suits in same courts, to which United States was not a party, pending and terminated as above, was 26,309, and the number of criminal cases in same courts, so pending and terminated, was 16,706. The Court of Claims, between the period of the making of said report and the last report, disposed of 90 cases, involving, as the aggregate amount claimed, \$4,662,032.24, besides dismissing 354 suits for want of prosecution.

With these figures before us, how strangely sounds the language of Mr. Brackenridge, in the Senate of United States, in opening, January 4, 1802, the celebrated debate on the judiciary bill, where he says: "I am inclined to think that so far from there having been a necessity at this time for an increase of courts and judges, that the time will never arrive when America will stand in need of thirty-eight judges." See *Debates*, published by Whiting, Leavenworth & Whiting, Albany, 1802, pp. 7, 8.

<sup>26</sup> *Marbury v. Madison*, 1 Cranch., 137; *Cohens v. Virginia*, 6 Wheat., 264; *Osborn v. Bank of United States*, 9 Wheat., 738; *Ex Parte Valandigham*, 1 Wall., 243; *The Alicia*, 7 Wall., 571.

<sup>27</sup> *Gittings v. Crawford*, 1 Taney, 1; *Graham v. Stucken*, 4 Blatch., 50.

<sup>28</sup> *Durousseau v. United States*, 6 Cranch., 307; *United States v. Moore*, 3 Cranch., 159; *Ex Parte Kearney*, 7 Wheat., 38; *Weston v. Charleston*, 2 Pet., 449; *Barry v. Mercein*, 5 How., 103; *Ex Parte McCordle*, 7 Wall., 506; *Ex Parte Yerger*, 8 Wall., 85.

<sup>29</sup> *Sheldon v. Sill*, 8 How., 441; *Osborn v. Bank of United States*, 9 Wheat., 738; *Turner v. Bank of North America*, 4 Dall., 8; *McIntyre v. Wood*, 7 Cranch., 504; *Kendall v. United States*, 12 Pet., 524; *Cary v. Curtis*, 3 How., 236. See also section 4, *ante*, p. 39.

first two were established by the Judiciary Act of 1789,<sup>30</sup> and the last by act of February 24, 1855.<sup>31</sup>

The primary object in the distribution of judicial power was to reach two classes of cases. "In one description of cases," says Mr. Chief Justice Marshall, in pointing out the distinction between the original and appellate jurisdiction of the Supreme Court, "the jurisdiction of the court is founded entirely on the *character of the parties*, and the nature of the controversy is not contemplated by the CONSTITUTION. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely in the *character of the case*, and the parties are not contemplated by the CONSTITUTION. In these, the nature of the case is everything, the character of the parties nothing."<sup>32</sup> This division, though not strictly applicable to all cases of Federal cognizance, will serve our purpose in bringing to view some of the more general rules, which have been laid down by the courts, with respect to the parties and controversies, over which, on account of their special character, the Federal courts have jurisdiction.

**§ 11. Same—Parties.**—Where jurisdiction depends upon the party, it is the party named in the record; and, in deciding who are parties to the suit, the courts, as a rule, will not look beyond the record.<sup>33</sup> The party, too, whose presence in the record is relied upon to sustain or defeat the jurisdiction, must be a real party, having an essential or direct interest in the controversy.<sup>34</sup> In actions at law

<sup>30</sup> For full text of sections 3 and 4 of said act, establishing the district and circuit courts, see *ante*, p. 12. See also note 24, *ante*, p. 51., showing the increase in judges and in the courts since their organization. For jurisdiction of circuit court, see section 30 *et seq.*, *infra*, and for jurisdiction of district court, see section 42 *et seq.*, *infra*.

<sup>31</sup> 10 Statutes at Large, p. 612. See also section 46, *infra*, as to jurisdiction of this court.

<sup>32</sup> *Cohens v. Virginia*, 6 Wheat., 264.

<sup>33</sup> *Davis v. Gray*, 16 Wall., 203; *Georgia v. Madrazo*, 1 Pet., 110.

<sup>34</sup> *Barney v. Baltimore*, 6 Wall., 280. In *Walden v. Skinner*, 101 U. S., 577, it was held that the jurisdiction of the circuit court is not defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee, citizens of the same State as the complainant, to perform the ministerial act of conveying title, in case the power to do so is vested in them by the

regard will be had to the parties having the legal title or right, and not to those having merely an equitable and beneficial interest.<sup>35</sup>

AMBASSADORS AND OTHER PUBLIC MINISTERS, AND THEIR DOMESTICS AND DOMESTIC SERVANTS—CONSULS AND VICE-CONSULS.—The language of the CONSTITUTION is: "To all cases *affecting* ambassadors, other public ministers, and consuls."<sup>36</sup> In the case of *Osborn v. Bank of U. S.*<sup>37</sup> it is said: "But suppose a suit be brought which affects the interest of a foreign minister, or by which the person of his secretary or of his servant is arrested, the minister does not, by the mere arrest of his secretary or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction and asserts his privilege. If the suit *affects* a foreign minister it must be dismissed, not because he is a party to it, but because it *affects* him." Where a private individual was indicted in the Circuit Court of the United States for an assault upon a *charge d'affaires*, and plead to the jurisdiction, that it was a case "*affecting* ambassadors, other public ministers, and consuls," within the meaning of the CONSTITUTION, and that the Supreme Court had not only original but exclusive jurisdiction of the case,

laws of the State. Mr. Justice Clifford, speaking for the court in this case, says: "Where the real and only controversy is between citizens of different States, or an alien and a citizen, and the plaintiff is, by some positive rule of law, compelled to use the name of another, to perform merely a ministerial act, who has not nor ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists;" citing "*McNutt v. Bland*, 2 How., 9-15; *Browne v. Strode*, 5 Cranch., 303; *Coal Company v. Blatchford*, 11 Wall., 172-177." See also *Horn v. Lockhart*, 17 Wall., 570; *Vattier v. Hinde*, 7 Pet., 252; *Conolly v. Taylor*, 2 Pet., 556. A mere colorable transfer to enable suit to be brought will, of course, not be allowed. *Maxfield v. Levy*, 4 Dall., 330. Nor can persons be made parties by designating them by fictitious names. *Kentucky Silver Mining Co., v. Day*, 2 Sawy., 468.

<sup>35</sup> *Bonafee v. Williams*, 3 How., 574; *Browne v. Browne*, 1 Wash., 429; *Rice v. Houston*, 13 Wall., 66; *Walker v. Beal*, 3 Cliff., 155. See also *Huff v. Hutchinson*, 14 How., 586; *McNutt v. Bland*, 2 How., 1; *Irvine v. Lowry*, 14 Pet., 293; *Browne v. Strode*, 5 Cranch., 303; *Ruan v. Gardner*, 1 Wash., 145; *Weed Sewing Machine Company v. Weeks*, 3 Dill., 261; *Williams v. Ritchie*, 3 Dill., 406; *Dunn v. Waggoner*, 3 Yerg., 59; *Coal Company v. Blatchford*, 11 Wall., 172; *Woods v. Davis*, 18 How., 467; *Wormely v. Wormely*, 8 Wheat., 421; *Smith v. Kerochan*, 7 How., 198.

<sup>36</sup> See section 2 of article 3, *ante*, p. 2.

<sup>37</sup> 9 Wheat., 738.

it was held that a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations and that of the United States, as in the case mentioned, affected the United States and the individual whom they sought to punish, and was one in which the minister himself, although the person injured by the assault, had no concern, either in the event of the prosecution or in the costs attending it.<sup>38</sup>

The privilege of an ambassador or other public minister or consul is not to be viewed merely as a personal privilege. It is the privilege of the country or government which they represent. "If the privilege or exception," says the court, in *Davis v. Packard*,<sup>39</sup> "was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the Constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments." Proof that an ambassador, minister, consul, etc., is received and recognized by the Executive of the United States, is conclusive as to his public character.<sup>40</sup>

In distributing among the several courts jurisdiction of cases affecting ambassadors, etc., a distinction is made between suits *against* and suits *by* them, and a further distinction as between public ministers and consuls, owing, no doubt, to the greater dignity and importance of the former. A suit *against* ambassadors or public ministers, or their domestics or domestic servants, can be brought only in the Supreme Court. In suits *by* them the Supreme Court has original but not exclusive jurisdiction; and so with respect to suits in which a consul or vice-consul is a party, the Supreme Court has original but

<sup>38</sup> *United States v. Ortega*, 11 Wheat., 467.

<sup>39</sup> 7 Pet., 276.

<sup>40</sup> *United States v. Ortega*, 4 Wash., 531.



not exclusive jurisdiction, cognizance being expressly given of certain suits by and against consuls and vice-consuls to the district court.<sup>41</sup>

UNITED STATES.—The propriety and necessity of giving to its own courts cognizance of controversies to which the general government should be a party is too manifest to admit of question. To have denied it admittance to its own tribunals, would have been to leave it wholly dependent upon the courts of the several States—courts in whose organization it had no voice and over whose process it had no control—for the adjudication of its various and important rights, contracts, privileges, etc., some of them intimately connected with the exercise of its sovereignty. The judicial power is extended by the CONSTITUTION not to *all cases* or to *all controversies*, but “to controversies to which the United States shall be a party.” The particular controversies, or the courts to have jurisdiction over them, not being designated by the CONSTITUTION, these were left to the determination of Congress. Congress has seen fit to distribute the original jurisdiction in this class of cases between the circuit courts,<sup>42</sup> district courts,<sup>43</sup> and Court of Claims,<sup>44</sup> the latter being the only court in which, without express consent, a suit can be maintained or a money judgment recovered against the United States.<sup>45</sup> In some cases, where, by their organization, they are competent to do so, the State courts may take cognizance, concurrent with the circuit courts, of suits brought by the general government, or by its officers authorized to sue in its behalf.<sup>46</sup> The word “controversies” is understood to embrace only suits of a civil nature.<sup>47</sup>

All suits for the recovery of any duties, imposts, or taxes, or for

<sup>41</sup> For the distinctions referred to in the text, see jurisdiction of Supreme Court, section 16, *infra*, and jurisdiction of district court, section 42, *infra*.

<sup>42</sup> See section 30, *infra*.

<sup>43</sup> See section 43, *infra*.

<sup>44</sup> See section 46, *infra*.

<sup>45</sup> Case v. Terrell, 11 Wall., 199; The Davis, 10 Wall., 15; The Siren, 7 Wall., 152; Avery v. United States, 12 Wall., 304; Hill v. United States, 9 How., 386; The Othello, 5 Blatch., 342.

<sup>46</sup> See sections 14 and 16, *infra*. Clafin v. Houseman, 93 U. S., 130.

<sup>47</sup> Cohens v. Virginia, 6 Wheat., 264; Chisholm v. Georgia, 2 Dall., 419.

the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering or recording, or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, are required by statute to be brought in the *name of the United States*.<sup>48</sup> Where a different mode of suing is not prescribed by law, the United States may, in all cases of contract, bring suit in their own name.<sup>49</sup> And they may sue on a note held by them, although the maker and payee are citizens of the same State.<sup>50</sup>

STATES.—The wisdom of confiding to that high tribunal, the Supreme Court of the Union, as the exclusive and ultimate arbiter, the power of determining “controversies between two or more States,” has been abundantly illustrated. It has secured calm and just judicial solutions of angry contentions, which threatened the public peace.<sup>51</sup> Under the CONSTITUTION, as modified by the eleventh amendment, and under the statutes of the United States, on account, no doubt, of its exalted position and the weight and influence of its decisions, as well as on account of the dignity of character of States as suitors, the Supreme Court is given original and exclusive

<sup>48</sup> Revised Statutes, section 919.

<sup>49</sup> *United States v. Barker*, 1 Paine, 156; *Duggan v. United States*, 3 Wheat., 172.

<sup>50</sup> *United States v. Green*, 4 Mason, 427. And generally the United States are entitled to such remedies in its own courts as ordinary individuals would have. See *Kohl v. United States*, 91 United States, 367; *Cotton v. United States*, 11 How., 229; *United States v. Ames*, 1 W. and M., 76; *United States v. Wilder*, 3 Sum., 308; *United States v. Boice*, 2 McLean, 352; *United States v. Stiner*, 8 Blatch., 544; *United States v. Buford*, 3 Pet., 12. In *Benton v. Woolsey*, 12 Pet., 27, Benton, as district attorney, filed an information in his own name, in behalf of the United States, for the purpose of foreclosing a mortgage to the United States. The court considered the United States as the real party, although, in form, the information was that of the district attorney. In the opinion it is said: “Although we have come to the conclusion that the proceeding is valid, and ought to be sustained by the court, it is certainly desirable that the practice should be uniform in the courts of the United States; and that in all suits, where the United States are the plaintiffs, the proceeding should be in their name, unless it is otherwise ordered by act of Congress.”

<sup>51</sup> *Rhode Island v. Massachusetts*, 12 Pet., 657-755. See remarks of Mr. Chief Justice Taney in *Ableman v. Booth*, 21 How., 506, p. 519.

jurisdiction of all other controversies of a civil nature besides that mentioned above, where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens. In the first, *i. e.*, controversies between a State and its citizens, it has no original jurisdiction whatever. In the second and third, *i. e.*, controversies between States and citizens of other States, and controversies between States and aliens, it has original but not exclusive jurisdiction of suits when *brought by States*. No Federal court has jurisdiction of suits *against a State* brought by citizens of other States or by aliens.<sup>52</sup>

A State entitled to invoke the jurisdiction of the Federal courts must, at the time, be a State of the Union, and must have a State government competent to represent it in its relations with the general government, so far, at least, as the institution and prosecution of the suit is concerned.<sup>53</sup>

It is not enough that a State is interested in the controversy; it must be a party to the record;<sup>54</sup> though a suit by or against the governor of a State, as such, in his official character, will, it has been held, be deemed a suit by or against the State itself.<sup>55</sup>

<sup>52</sup> See eleventh amendment, *ante*, p. 2.

<sup>53</sup> *Texas v. White*, 7 Wall., 700. A Territory is not a State. *New Orleans v. Winter*, 1 Wheat., 91. The District of Columbia is not a State. *Hephurn v. Elzey*, 2 Cranch., 445.

<sup>54</sup> *Davis v. Gray*, 16 Wall., 203.

<sup>55</sup> *Kentucky v. Ohio*, 24 How., 66; *Governor of Georgia v. Madrazo*, 1 Pet., 110.

The question as to when a suit will be deemed a suit *against a State* so as to defeat jurisdiction, has been frequently considered. The general rule, as stated in the text, supported by the case of *Davis v. Gray*, 16 Wall., 203, that a State is not a party unless it appears on the record as such, is undoubtedly correct, but the question still remains whether a suit in which a State is not, *eo nomine*, a party, may not, having regard to its character and objects, be nevertheless a suit against a State.

At its August term, 1791, in the case of *Vanstophorst v. The State of Maryland*, 2 Dall., 401, which was a case of original jurisdiction, the plaintiff moved the Supreme Court to issue a commission to examine witnesses in Holland. The court, no question being made as to jurisdiction, declined to award the commission until commissioners were named. At its February term, 1793, in the case of *Oswald v. The State of New York*, 2 Dall., 415, also a case of original jurisdiction, the Supreme Court, the writ having been served, made an order that unless the defendant appeared or showed cause to the contrary, judgment by default would be entered, etc. At the

**CITIZENS—WHO ARE.**—The CONSTITUTION extends the judicial power to controversies “between a State and *citizens* of another State, between *citizens* of different States, between *citizens* of the same State claiming land under grants from different States, and between a State,

same term (February, 1793), the celebrated case of *Chisholm v. The State of Georgia*, 2 Dall., 419, was decided. The case was one of original jurisdiction, in form an action of assumpsit, and the question directly presented as to whether a State could be sued by a citizen of another State. The State of Georgia filed a written remonstrance against the exercise of the jurisdiction. Upon points indicated by the court, Mr. Randolph, Attorney-General of the United States, argued the case as counsel for Chisholm. The subject was elaborately considered, the justices delivering opinions *seriatim*. With the exception of Mr. Justice Iredell, all resolved in favor of the jurisdiction. The result led Congress to propose, and the States to adopt, the eleventh amendment of the Constitution, declaring, in express terms, that “The judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.” This amendment was declared ratified January 8, 1798. Its effect was to dismiss all pending suits. *Hollingsworth v. Virginia*, 3 Dall., 378. At its February term, 1799, in *Fowler v. Lindsey*, 3 Dall., 411, the question arose in this way: Actions of ejectment had been brought in the Circuit Court of the United States for the district of Connecticut to recover a tract of land, being a part of the *Connecticut gore*, which Connecticut had granted to Ward, *et al.* The defendants claimed that the land lay in New York, and denied the jurisdiction of the circuit court, the State court, or any other court, to take cognizance of the action. The plaintiff insisted that the premises lay in Connecticut. On a rule to show cause why the actions should not be removed by *certiorari* into the Supreme Court, as exclusively belonging to that jurisdiction, Mr. Justice Washington, delivering the opinion of the court, says: “The first question that occurs, from the arguments on the present occasion, respects the nature of the rights, that are contested in the suits, depending in the circuit court. Without entering into a critical examination of the Constitution and laws, in relation to the jurisdiction of the Supreme Court, I lay down the following as a safe rule: That a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a State has in the controversy, must be a case in which a State is either nominally or substantially the party. It is not sufficient that a State may be consequentially affected, for in such case (as where the grants of different States are brought into litigation) the circuit court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions that have been founded on the remote interest of the State, in making retribution to her grantees, upon the event of an eviction.

“It is not contended that the States are nominally the parties, nor do I think that they can be regarded as substantially the parties to the suits; nay, it appears to me that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil, they may contest it at any time in this court, notwithstanding a decision in the present suits, and though they may

or the *citizens* thereof, and foreign states, citizens or subjects." The inquiry, "who are citizens?" at once suggests itself. It is declared in the fourteenth amendment that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision, as to the former object, between individual citizens, can never affect the right of the State, as to the latter object; it is *res inter alios acta*. For, suppose the jury in some cases should find in favor of the title under *New York*, and, in others, they should find in favor of the title under *Connecticut*, how would this decide the right of jurisdiction? And on what principle can private citizens, in the litigation of their private claims, be competent to investigate, determine, and fix the important rights of sovereignty?"

In consequence of the ruling rejecting the motion to grant a writ of *certiorari* in above case, the State of New York filed in the Supreme Court of the United States a bill in equity against the State of Connecticut, at its February term, 1799 4 Dall., 1

In the case of the United States v. Judge Peters, 5 Cranch., 115, February term, 1809, the effect of the eleventh amendment was considered. Olmstead, *et al*, applied to the Supreme Court for a mandamus, to be directed to Judge Peters, commanding him to issue proper process to enforce obedience to the sentence of the District Court of the United States for the district of Pennsylvania in a civil cause of admiralty and maritime jurisdiction, in which Olmstead, *et al*, were libellants, and Elizabeth Sergeant, *et al*, executrixes of David Rittenhouse, were respondents. Judge Peters returned to the Supreme Court, as cause for not executing the sentence, an act of the Legislature of Pennsylvania, passed subsequent to the rendition of the sentence, which required the Governor of that State to demand the money which had been decreed to Olmstead, *et al*, and in default of payment, to direct the attorney-general to institute suit for the recovery thereof. Said act also authorized the Governor to use any further means he might think necessary to protect the interests of the State, or the persons and properties of the parties holding the money, against any process issued out of the Federal courts. David Rittenhouse, the testator, was Treasurer of the State of Pennsylvania when he received the money in controversy, but the facts showed that it was not in the possession of the State, but in the possession of said Rittenhouse, as an individual, and, as held by the court, passed, upon his death, like other property, to his representatives. In answer to the contention that the Federal courts were deprived of jurisdiction by the eleventh amendment, Mr. Chief Justice Marshall, speaking for the court, says:

"The right of a State to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be construed as to onst the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against the State. The State cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is

of the United States and of the State wherein they reside.”<sup>56</sup> The statutory provisions upon the subject are as follows: By section 1992, Revised Statutes, “All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are de-

not necessarily a defendant. In this case, the suit was not instituted against the State or its Treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.

“If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the State of Pennsylvania.”

In *Cohens v. Virginia*, 6 Wheat., 264, decided at the February term, 1821, the effect of the eleventh amendment was again considered. A writ of error was issued by the Supreme Court of the United States to the quarterly session court for the borough of Norfolk, in the State of Virginia, under section 25 of the Judiciary Act (see section in full, *ante*, p. 20), it being the highest court of equity in that State having jurisdiction of the case. An information was filed against Cohens in the State court for selling lottery tickets contrary to an act of the legislature. He claimed the protection of an act of Congress. The question in the State court was whether the act of the Legislature of Virginia, prohibiting the sale, was valid, notwithstanding the act of Congress. Motion was made to dismiss the writ of error, mainly upon the grounds: 1. That a State was a defendant. 2. That no writ of error lay from the Supreme Court of the United States to a State court. Mr. Chief Justice Marshall, after announcing, as the conclusion of the court, that, as the Constitution originally stood, the appellate jurisdiction of the court, in all cases arising under the Constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party, thus refers to the eleventh amendment:

“It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must

<sup>56</sup> See *Robertson v. Cease*, 97 U. S., 646.

clared to be citizens of the United States." Section 1993, Revised Statutes, provides that "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are

ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

"The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation.

"The words of the amendment appear to the court to justify and require this construction. The judicial power is not 'to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State,'" etc.

The case of *Osborn v. The Bank of the United States*, 9 Wheat., 738, decided February term, 1824, was this: A bill was filed in the Circuit Court of the United States, in Ohio, by the Bank of the United States, to restrain Osborn, who was Auditor of said State, from levying and collecting, under an act of the Legislature of said State, an annual tax on each office of discount and deposit, of fifty thousand dollars. An injunction was awarded. Subsequent thereto an amended bill was filed, charging that Harper, who was employed by Osborn to collect the tax, and who well knew that an injunction had been allowed, proceeded by violence to the office of the bank at Chillicothe, and took therefrom \$100,000 in specie and bank notes belonging to or in deposit in the bank; that this money was delivered to Curry, then Treasurer of the State, or to Osborn, both of whom had notice of the illegal seizure; that Curry kept the same until he delivered it over to Sullivan, his successor as Treasurer; that neither Curry nor Sullivan held the money in their character as Treasurer, but as individuals. The prayer of the bill was that Curry, late Treasurer, Sullivan, present Treasurer, and Osborn, in their official and private characters, and Harper, be made defendants; that they make discovery and be enjoined from using or paying away said money, and be decreed to restore the same, and be enjoined from proceeding further under

declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”<sup>57</sup> And section 1994, Revised Statutes, declares that “Any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized,

said act. Curry, in his answer, admitted that Harper had delivered to him \$98,000, which he believed was the tax levied on the Branch Bank of the United States; that he passed this sum to the credit of the State as revenue, but, in fact, kept it separate from other moneys until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the House of Representatives of the State, after which he resigned his office; that the monéys, still separate from other moneys, came into the hands of Sullivan, the present Treasurer. Sullivan, failing to answer, an attachment for contempt was issued, on which he was taken into custody. Afterwards, on filing answer, he was discharged. In his answer, Sullivan denied all personal knowledge of the levying, collecting, and paying over of the money; that, as the successor of Curry, he found this \$98,000 among the funds in the treasury, which he believes is the money mentioned in the bill; that he gave a receipt for the money as Treasurer, and that it had remained in his hands as Treasurer, and not otherwise; that it remained untouched out of respect to an injunction said to have been allowed by the circuit court, and that he had no private individual interest in the money, and held it only as State Treasurer. The circuit court, upon hearing, decreed restoration of the money to the bank. The case was carried by appeal to the Supreme Court. The opinion was delivered by Mr. Chief Justice Marshall. He says:

“The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

“The State of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a State, can be sustained against such agent, because they would be substantially against the State itself, in violation of the eleventh amendment of the Constitution.

“That the courts of the Union cannot entertain a suit brought against a State by an alien, or the citizen of another State, is not to be controverted. Is a suit, brought against an individual, for any cause whatever, a suit against a State, in the sense of the Constitution?

“The eleventh amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

“The words of the Constitution, so far as they respect this question, are: ‘The judicial power shall extend to controversies between two or more States, between a

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<sup>57</sup> Revised Statutes, section 1993.



shall be deemed a citizen." The authority to naturalize citizens belongs, under the CONSTITUTION and laws, exclusively to the Federal government.<sup>58</sup> The mode provided by Congress<sup>59</sup> must be conformed to, and it is not within the power of a State to make the subject of a foreign government a citizen of the United States.<sup>60</sup>

State and citizens of another State and between a State and foreign States, citizens, or subjects.'

"A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which 'a State shall be a party.'

"The words of the eleventh amendment are: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of a foreign State.'

"The Bank of the United States contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

"The appellants admit that the jurisdiction of the court is not ousted by any incidental or consequential interest which a State may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the State, through its officers.

"If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party, who is not made so in the record. But the court will not review those decisions, because it is thought a question, growing out of the Constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the courts of any other country.

"Do the provisions, then, of the American Constitution, respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?

"The first in the enumeration is a controversy between two or more States.

"There are not many questions in which a State would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory. Yet the Constitution, not considering the State as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different States. If each State, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the Constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the Constitution does not consider the State as a party in such a case.

"Jurisdiction is expressly granted in those cases only where citizens of the same

<sup>58</sup> Constitution, article I, section 8, clause 4. *Chirac v. Chirac*, 2 Wheat., 259; *Scott v. Sandford*, 19 How., 393.

<sup>59</sup> Revised Statutes, section 2165, *et seq.*

<sup>60</sup> *Lanz v. Randall*, 4 Dill, 425, per Mr. Justice Miller.

Persons of African descent born in the United States are citizens, and for their benefit it has been enacted "that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties,

State claim lands under grants of different States. If the claimants be citizens of different States, the court takes jurisdiction for that reason. Still, the right of the State to grant is the essential point in dispute; and in that point the State is deeply interested. If that interest converts the State into a party, there is an end of the cause; and the Constitution will be construed to forbid the circuits courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same State.

"We are aware that the application of these cases may be denied, because the title of the State comes on incidentally, and the appellants admit the jurisdiction of the court, where its judgment does not act directly upon the property or interests of the State; but we deemed it of some importance to show that the framers of the Constitution contemplated the distinction between cases in which a State was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record.

"In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented, of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

"The next in the enumeration is a controversy between a State and the citizens of another State.

"Can this case arise if the State be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the Federal court of the State in which the officer resides. The interest of the State is obvious. Yet it is admitted that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State, in the hands of its

give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white* citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."<sup>61</sup>

officer. And yet the argument admits that the action, in such a case, would be sustained. But, suppose in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

"It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a State may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

"If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

"In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is 'controversies to which the United States shall be a party.'

<sup>61</sup> Revised Statutes, section 1977; *Ex Parte* Turner, Chase, 157; *United States v. Rhodes*, 1 Abb. U. S., 28; *United States v. Canter*, 2 Bond, 389.

With respect to Indians, it has been held, notwithstanding the fourteenth amendment, that the Indian tribes within the territory of the United States are independent political communities, and a child of a member thereof, though born in the United States, is not a citizen thereof, because not born subject to its jurisdiction.<sup>62</sup>

"Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

"Let us examine this question.

"Suits brought by the Postmaster-General are for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

"The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the Federal courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record.

"Were a State to be the sole legatee, it will not, we presume, be alleged that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact, than by the fact that any other person, not suable in the courts of the Union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the State.

"This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the exist-

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<sup>62</sup> *McKay v. Campbell*, 2 Sawy., 118; *Karrahoo v. Adams*, 1 Dill., 344. See *Ex Parte Kenyon*, 5 Dill., 385, where it is held that an Indian may abandon his tribe, and for the purpose of jurisdiction, become a member of the body politic, known as citizens of the United States.

The same person may at the same time be a citizen of the United States and a citizen of a State.<sup>63</sup> And a person may be a citizen of the United States and not a citizen of any particular State.

For the purpose of bringing a case dependent upon citizenship

ence of an interest in a party not named; and by showing that, under the distributive clause of the second section of the third article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

"But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

"The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

At the same term (February, 1824), at which the above opinion was delivered, the case of *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat., 904, was decided. It was brought upon a certificate of division of opinion between the judges of the Circuit Court of Georgia, and was argued by the same counsel with *Osborn's* case.

The Bank of the United States brought suit against the Planters' Bank, in the circuit court, on certain notes, payable to a person named therein, or "bearer," alleging that they had been duly transferred to it, etc.

The Planters' Bank plead to the jurisdiction, alleging that it was a corporation of which the State of Georgia and certain individuals, citizens of that State, were members. The Bank of the United States demurred to this plea, and it was upon the demurrer that the judges were divided in opinion. "Does the circumstance," says Mr. Chief Justice Marshall, for the court, "that the State is a corporator bring this cause within the clause in the Constitution which gives jurisdiction where a State is a party, or bring it within the eleventh amendment?" We extract from his opinion as follows:

"Is the State of Georgia a party defendant in this case? If it is, then the suit, had the eleventh amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this court have entertained jurisdiction in this case?

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<sup>63</sup> *United States v. Cruikshanks*, 92 U. S., 542.

within the jurisdiction of the Federal courts, regard is had to the fixed and permanent residence or domicile of the party as essential to his character of citizenship,<sup>64</sup> for it is *citizenship*, and not simply *residence*, which must be shown by the record.<sup>65</sup>

"We think it could not. To have given the Supreme Court original jurisdiction, the State must be plaintiff or defendant as a State, and must, as a State, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the State of Georgia than against any other individual corporator. The State is not a party, that is, an entire party, in the cause.

"If this suit could not have been brought originally in the Supreme Court, it would be difficult to show that it is within the eleventh amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the Constitution; and if this case be not one of which the Supreme Court could have taken original jurisdiction, it is not within the amendment. This is not, we think, a case in which the character of the defendant gives jurisdiction to the court. If it did, the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the Federal courts, but because the plaintiff has a right to sue any defendant in that court, who is not withdrawn from its jurisdiction by the Constitution, or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The State does not, by becoming corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of this Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts more as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in

<sup>64</sup> *Shelton v. Tiffin*, 6 How., 163; *Little v. Gould*, 2 Blatch., 165.

<sup>65</sup> *Robertson v. Coase*, 97 U. S. 646; see extract from opinion in this case, *ante*, note 11, p. 46. See also *Parker v. Overman*, 18 How., 137.

It is the status of the party, as to citizenship, at the time of instituting suit, which controls the question of jurisdiction, and subsequent changes of residence and citizenship neither sustain or defeat it.<sup>66</sup> Actual changes of citizenship, though made with the

the senso of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

"We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the Federal courts, by the circumstance that the State is a corporator."

The case of the Governor of Georgia v. Juan Madrazo, 1 Pet., 110, was decided at January term, 1828. The case, as stated in the opinion, is as follows:

"Some time in the year 1817, Juan Madrazo, a Spaniard, residing in the Island of Cuba, engaged in the slave trade, fitted out a vessel for the coast of Africa, which procured a cargo of Africans; and on its return, in the autumn of 1817, was captured by a privateer sail, under the flag of one of the governments of Spanish America, and carried into Amelia Island; where the vessel and cargo were condemned by a tribunal, established by Aury, the authority of which has not been acknowledged in this country. The Africans were purchased by William Bowen, and were conducted into the Creek nation, within the limits of the State of Georgia, where they were seized by McQueen McIntosh, a revenue officer, at Darien, in Georgia, early in January, 1818, under the act of 1807, which prohibits the importation or bringing into the United States, of any negro, mulatto, or person of color. This act annuls the title of the importer, or any person claiming under him, to such negro, mulatto, or person of color, and declares that such persons 'shall remain subject to any regulation, not contravening the provisions of this act, which the legislatures of the several States or Territories, at any time hereafter, may make for disposing of such negro, mulatto, or person of color.'

"In December, 1817, the Legislature of Georgia passed an act, which empowered the Governor to appoint some fit and proper person to proceed to all such ports and places within this State, as have or may have, or may hereafter hold any negroes, mulattoes, or persons of color, as have been, or may hereafter be seized or condemned under the above recited act of Congress, and who may be subject to the control of this State; and the person so appointed shall have full power and authority to receive all such negroes, mulattoes, or persons of color, and to convey the same to Milledgeville, and place them under the immediate control of the Executive of this State.

"The second section authorizes the Governor to sell such negroes, mulattoes, or persons of color, in such manner as he may think most advantageous to the State.

"The third directs that they may be delivered up to the Colonization Society, on certain conditions therein expressed; provided the application be made before the sale.

<sup>66</sup> Culver v. Woodruff Co., 5 Dill., 392; see authorities collected in note 21, *ante*, p. 50.

motive and for the purpose of acquiring a capacity to sue in the courts of the United States, will be upheld.<sup>67</sup> And transfers of property and rights so as to enable citizens of other States to sue, provided they are *bona fide*, and not merely colorable, are good.<sup>68</sup>

"Under this act, the Africans brought in by William Bowen were delivered up to the Governor of Georgia, who sold the greater number of them, and paid the proceeds, amounting to \$38,000, into the treasury of the State. The Colonization Society applied for those remaining unsold, amounting to rather more than twenty, and offered to comply with the conditions prescribed in the act of December, 1817.

"In May, 1820, the Governor of Georgia filed an information in the District Court of Georgia, stating the violation of the act of Congress, that the Africans were placed under the immediate control of the Executive of the State, where they awaited the decree of the court. He states the application made on the part of the Colonization Society, with which he is desirous of complying, as soon as he shall be authorized to do so by the decree of the court.

"In November, 1820, William Bowen filed his claim to the said Africans, alleging that they were his property—that they had not been brought into the United States in violation of the act of Congress; but were seized while passing through the Creek nation, on their way to West Florida.

"In February, 1821, Juan Madrazo filed his libel, alleging that the Africans were his property; that on the return voyage from Africa, they were captured by the privateer *Successor*, commanded by an American, and fitted out in an American port; that the vessel and cargo were carried into Amelia Island, and condemned by an unauthorized tribunal; after which they were brought by the purchaser into the Creek nation, where they were seized by an officer of the United States, brought into the limits of the district of Georgia, and delivered over to the government of that State, in pursuance of an act of the General Assembly, carrying into effect an act of Congress, in that case made and provided. That a part of the slaves were sold, and the proceeds, amounting to \$38,000, or more, paid into the Treasury of the State; and that the residue, amounting to twenty-seven or thirty, remain under the control of the Governor.

"The libel denies that the laws of the United States have been violated, and prays that admiralty process may issue to take possession of the slaves remaining under the control of the Governor of Georgia; and that the Governor and all others concerned, should be cited to show cause why the said slaves should not be restored to Juan Madrazo, and the proceeds of those which had been sold paid over to him.

"Upon this libel a motion was issued to the Governor of Georgia, who appeared and filed a claim on behalf of the State; in which he says, that the slaves were brought into the State in violation of the act of Congress, and that they were taken

<sup>67</sup> See authorities collected in note 19, *ante*, p. 50; see also *Kemna v. Brockhaus*, 5 Fed. Rep., 762; *Pond v. Vermont Valley Railroad Company*, 12 Blatch., 280.

<sup>68</sup> See authorities collected in note 18, *ante*, p. 50; see also *Wells v. Newberry*, 4 McLean, 226; *Thatcher v. Winslow*, 5 Mason, 58; *Smith v. Kernochen*, 7 How., 198.



There are, however, some limitations upon the right of assignees to maintain suits, though they have the requisite citizenship.<sup>69</sup>

**SAME—ASSIGNEES.**—By act of March 3, 1875, no circuit or district court can "have cognizance of any suit founded on contract, in favor

into the possession of the Executive of the State, in pursuance of the act of the State Legislature, enacted to carry the act of Congress into effect. That a number of the said slaves have been sold, and the proceeds paid into the treasury, where they have become a part of the funds of the State, not subject to his control, or to the control of the Treasurer. That the residue of the said slaves, who remain unsold, have been demanded under the law by the Colonization Society.

"Process was also issued against the Africans, but was not executed. The two causes came on together, and the district court dismissed the claim of Bowen, and also dismissed the libel of Madrazo, and directed that the slaves remaining unsold should be delivered by the marshal to the Governor of the State, and that the proceeds of those sold, should remain in the treasury.

"Both Bowen and Madrazo appealed to the circuit court.

"At the hearing in the circuit court, the sentence, dismissing the claim of Bowen, was affirmed. That dismissing the libel of Madrazo was reversed, and a decree was made, that the slaves remaining unsold should be delivered to him, on his giving security to transport them out of the United States; and farther, that the proceeds of those which were sold should be paid to him. From this decree, the Governor of Georgia and William Bowen have appealed to this court."

After reviewing the case of *Chisholm v. Georgia*, 2 Dall., 419; *Hollingsworth v. Virginia*, 3 Dall., 378; *Georgia v. Brailsford*, 2 Dall., 402; *New York v. Connecticut*, 4 Dall., 3; *Fowler v. Lindsey*, 3 Dall., 411; *United States v. Peters*, 5 Cranch., 115; and *Osborn v. Bank of United States*, 9 Wheat., 738, Mr. Chief Justice Marshall says:

"The information of the Governor of Georgia professes to be filed on behalf of the State, and is, in the language of the bill, filed by the Governor of Georgia on behalf of the State, against Brailsford.

"If, therefore, the State was properly considered as a party in that case, it may be considered as a party in this.

"The libel of Madrazo alleges that the slaves which he claims, 'were delivered over to the Government of the State of Georgia, pursuant to an act of the General Assembly of the said State, carrying into effect an act of Congress of the United States, in that case made and provided; a part of the said slaves sold, as permitted by said act of Congress, and as directed by an act of the General Assembly of the said State; and the proceeds paid into the treasury of the said State, amounting to thirty-eight thousand dollars, or more.'

"The Governor appears, and files a claim on behalf of the State, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the Executive, under the act of the Legislature of Georgia,

<sup>69</sup> See note 70, *infra*.

of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law-merchant, and bills of exchange."<sup>70</sup> The important changes effected by this statute render

made to give effect to the act of Congress on the subject of negroes, mulattoes, or people of color, brought illegally into the United States; and the proceeds of those unsold to have been paid in the treasury, and to be no longer under his control.

"The case made, in both the libel and the claim, exhibits a demand for money actually in the treasury of the State, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the Executive, by any violation of an act of Congress. The possession has been acquired, by means which it was lawful to employ.

"The claim upon the Governor, is as a Governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially.

"The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal

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<sup>70</sup> 18 Stats. at L., 470, Sec. 1. See this statute in full, in notes to section 30, *infra*.

The old law (Judiciary Act of 1789) incorporated in Revised Statutes, section 629, is as follows: "That no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

The only exception here made in favor of assignees is the case of a *foreign bill of exchange*. Under the act of March 3, 1875, the exception is extended to *promissory notes negotiable by the law-merchant*, and to *bills of exchange*; no distinction being made between inland and foreign bills. Under the old law (section 11, Judiciary Act of 1789, Revised Statutes, section 629), it was uniformly held that the holder of a promissory note, payable to bearer, was not an assignee within the meaning of the statute, for the reason that a note payable to bearer is payable to anybody who may become the holder, and the contract is with the holder who acquires title, not by assignment, but by delivery. *Bank of Kentucky v. Wister*, 2 Pet., 318; *Bonafoe v. Williams*, 3 How., 574; *Bullard v. Bell*, 1 Mason, 243; *Wood v. Dunner*, 3 Mason, 308; *Bradford v. Jenks*, 2 McLean, 130; *Noell v. Mitchell*, 4 Biss., 346. It was also held that an endorser, as against his immediate endorser, could maintain suit when they were citizens of different States, as there was an immediate privity of contract between them, not to be affected by the disabilities of the other parties to paper. *Young v. Bryan*, 6 Wheat., 146; *Evans v. Gee*, 11 Pet., 80; *Keary v. Farmers, etc, Bank*, 16 Pet., 89. And that an executor or administrator was not an assignee within the meaning of the prohibition (*Mayer v. Foulkrod*, 4 Wash., C. C., 349; *Sere v. Pitot*, 6 Cranch., 332), and that it did not apply to an action of replevin to recover the instrument itself. *Deshler v. Dodge*, 16 How., 622.

inapposite many of the decisions under the old law, especially those relating to notes and bills. As the law now stands, if the paper be a promissory note, negotiable by the law-merchant,<sup>71</sup> or a bill of exchange,<sup>72</sup> and the immediate parties possess the necessary citizenship,

bond was executed by a different Governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

"But were it to be admitted, that the Governor could be considered as a defendant in his personal character, no ease is made which justifies a decree against him personally. He has acted in obedience to a law of the State, made for the purpose of giving effect to an act of Congress; and has done nothing in violation of any law of the United States.

"The decree is not to be considered as made in a case in which the Governor was a defendant, in his personal character; nor could a decree against him, in that character, be supported.

"The decree cannot be sustained as against the State, because, if the eleventh amendment to the Constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as

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<sup>71</sup> A coupon payable to bearer is a promissory note, negotiable by the law-merchant, within the meaning of the act of March 3, 1875. *Cooper v. Town of Thompson*, 13 Blatch., 434. Under the same statute it is held by the United States Circuit Court for the District of Indiana, that as the statute of that State only makes notes payable to bearer or order, at a particular bank, negotiable as inland bills of exchange, notes not so payable are not "negotiable by the law-merchant." *Gresham, J.*, (with whom *Drummond, J.*, concurred) in delivering the opinion, said: "In Indiana only notes payable to bearer or order at a bank in this State are negotiable as inland bills of exchange. The question is, what is meant by the words 'promissory notes negotiable by the law-merchant,' in the act of Congress? The plaintiff insists that Congress contemplated all promissory notes negotiable at common law or by the statute of Anne. I think Congress meant by this language, notes having the qualities of promissory notes negotiable by the law-merchant, namely, notes which, in the hands of a *bona fide* purchaser for value before maturity, were subject to no equities in favor of the maker. The note sued on was given in Indiana and payable in Indiana, but not at a bank in this State, so that by the law of Indiana, whatever equities the maker was entitled to, as against the payee, he may assert against any

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<sup>72</sup> Bill of exchange defined in *Mandeville v. Welch*, 5 Wheat., 277; *Olshausen v. Lewis*, 1 Biss., 419.

it is all that is required. The assignment and transfer must, of course, be *bona fide*.<sup>73</sup>

With respect to assignments, other than those pertaining to negotiable paper, the citizenship of the person, through whom the assignee

a suit, prosecuted not against the State, but against the thing; because the thing was not in possession of the district court."

In *Bank of Kentucky v. Wister et al.*, 2 Pet., 318, decided in 1829, the bank, being sued in the Circuit Court of the United States for money had and received, pleaded to the jurisdiction on the ground that the State of Kentucky was the sole proprietor of the stock, and that the suit was virtually a suit against a sovereign State. The court held the plea not good, regarding the question as settled by the case of the *United States Bank v. Planters' Bank of Georgia*, 9 Wheat., 904, *supra*.

In *Ex Parte Madrazo*, 7 Pet., 627, decided in 1833, Madrazo presented to the Supreme Court a libel in admiralty against the State of Georgia, claiming relief as a citizen of Spain. The court was asked, if it should be of opinion that, notwithstanding the eleventh amendment, jurisdiction could be entertained in a *suit in the admiralty* against a State, then to award proper process against the State, returnable to the next term. The court said: "The case is not a case where the property is in the custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a State to recover proceeds in its

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indorsee. That was the law of the contract. The statute of the State entered into and became a part of the note.

"The statute already cited makes all promissory notes negotiable so far as to vest the property in each indorsee successively, but unless the note is made payable to order or bearer at a particular bank in this State, it cannot be said to possess all the privileges or immunities of a note negotiable according to the law-merchant. The statute of Anne has generally been adopted in this country, but has never been adopted in this State." *Gregg v. Weston*, 7 Biss., 360; see also *Miller v. Austen*, 13 How., 218; *White v. Vermont, etc.*, R. R. Co., 21 How., 575. In *Howenstein v. Barnes*, 8 Reporter, 326, U. S. C. C. Kansas, it was held by Foster, J., that an instrument in writing, in form a promissory note, was not rendered non-negotiable because it contains a stipulation to pay attorney's fees if suit be instituted on the note. The action was brought by plaintiff as receiver of a bank in Missouri, against makers on two promissory notes executed in Kansas, and payable in Missouri, with a stipulation in either note to pay attorney's fees if suit were instituted on the note. The notes were discounted before maturity by the bank in Missouri.

Foster, J., in delivering the opinion of the court, said: "The Supreme Court of Kansas has decided that such notes are negotiable instruments. 18 Kan., 435. The Supreme Court of Missouri has decided that they were not negotiable instruments.

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<sup>73</sup> *Wells v. Newberry*, 4 McLean, 224; *Thatcher v. Winslow*, 5 Mason, 58; *Smith v. Kernochen*, 7 How., 198.

derives title; should be such as to give the court jurisdiction just as if no assignment had been made,<sup>74</sup> and this should appear affirmatively of record, with the burden of proof on the plaintiff.<sup>75</sup> This inhibition, it has been held, applies as well to assignees, by operation of

possession, and in such a case no private person has a right to commence an original suit in this court against a State."

*Briseoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet., 257, decided in 1837, was a writ of error to the Court of Appeals of that State. It was therein again held, citing the cases of the *Bank of United States v. Planters' Bank*, 9 Wheat., 904; *Bank of Kentucky v. Wister*, 3 Pet., 318; and *United States Bank v. Planters' Bank*, 9 Wheat., 904, *supra*, that the fact that a State was the exclusive stockholder in a bank did not change the character of the corporation or make the bank identical with the State.

In the *Louisville Railroad Company v. Letson*, 2 How., 497, decided in 1844, it was held that a citizen of one State could sue a corporation which had been created by and transacted its business in another State (the suit being brought in the latter State), although some of the members of the corporation were not citizens of the State in which the suit was brought, and although the State itself was a member of the corporation. The *Bank of the United States v. The Planters' Bank*, 9 Wheat., 904, is referred to in support of the opinion.

*State Bank of Ohio v. Knoop*, 16 How., 369, decided in 1853, was a writ of error

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63 Mo., 34. These decisions rest upon constructions of the general principles of the law-merehant. It has been held that the law of the place of performance is to control as to the construction and interpretation of the contract; and again, it has been as clearly held that a contract, legal by the laws of the place where made, is valid, and will be enforced in other jurisdictions. Story on Prom. Notes, 179; *Tilden v. Blair*, 21 Wall., 247. From the authorities which I have been able to examine, the true rule of construction is this: 'Any interpretation or construction, applicable or incidental to the performance, should be governed by the law of the place of performance; and such matters of construction or interpretation, as go to the execution and validity of the contract, are determined by the laws of the place where the contract was made.' *Scutter v. Bank*, 91 U. S., 406.

"The parties are presumed to have contracted with reference to the law as it really is, and it really is the same in both States, for it is a part of the common law of the land, and this court must base its decision on that law. And it seems to me the only way the defendants can be relieved from liability would be to hold that, under the commercial law of this country, these contracts are not promissory notes, because not drawn for an amount certain, by reason of the provision for an attorney's

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<sup>74</sup> *Morgan v. Gay*, 19 Wall., 81; *Montalet v. Murray*, 4 Cranch., 46; *Mollan v. Lorrance*, 9 Wheat., 537; *Gibson v. Chew*, 16 Pet., 315; *Wilkinson v. Wilkinson*, 2 Curtis, 582.

<sup>75</sup> *Bradley v. Rhines*, 8 Wall., 393.

law, as to those who become such by voluntary contract.<sup>76</sup> It does not, however, prevent a citizen of one State, having title to lands in another State, from suing, though the fact be that he derived his title from a citizen of the State in which the lands lie;<sup>77</sup> nor does it em-

to the Supreme Court of Ohio. A tax in excess of that fixed by the charter of the bank had been assessed by the State against it. The court held, reversing the judgment of the State court, that this was a contract, the obligation of which could not be impaired, etc. At the same term (1853) the case of *Ohio Life Insurance and Trust Company v. Debolt*, 16 How., 416, was decided. This was also a writ of error to a State court of Ohio, and involved the validity of a tax. The judgment of the State court was affirmed.

*Dodge v. Woolsey*, 18 How., 331, decided in 1855, was an appeal from the Circuit Court of the United States for the district of Ohio. Woolsey, a citizen of Connecticut, filed a bill seeking to enjoin the collection of a tax assessed by the State of Ohio on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio, in which he owned certain shares of capital stock. He made Dodge, the tax collector, the directors of the bank, and the bank itself defendants. The circuit court perpetually enjoined the collection of the tax, and its decree was affirmed by the Supreme Court, upon the ground that the act of the Legislature of Ohio, imposing the tax, was in conflict with the Constitution of the United States, as impairing the obligation of a contract. *The Mechanics' and Traders' Bank v. Debolt*, 18 How., 380, decided at same term (1855) was a writ of error to the Supreme Court of Ohio, and settles the same principle as *Dodge v. Woolsey*, *supra*. *The Jefferson Branch Bank v. Skelly*, 1 Black., 436, decided in 1861, was also a writ of error to the Supreme Court of Ohio and is to the same effect as the preceding cases.

*Davis v. Gray*, 16 Wall., 203, was decided in 1872. It was an appeal from the

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fee. And, in support of that proposition, there are several very respectable authorities: *Bank v. Gay*, 63 Mo., 34; 64 *Id.*, 476; *Woods v. Worth*, 84 Penn. St., 31; 24 Ill., 168. On the other side, there are many equally respectable authorities: *Gale v. Bank*, 11 Bush., 180; *Sperry v. Horo*, 32 Iowa, 184; *Stoneman v. Pyle*, 35 Ind., 103; 37 *Id.*, 512; *Soton v. Scoville*, 18 Kan., 435, and cases cited therein. The reasoning upon which the Kentucky, Iowa, and other cases following them rest their decisions appears to me to be correct, and the conclusion reached is more in accordance with the advanced views of the present time and with the general principles established by the Supreme Court of the United States in *Morcor County v. Hackett*, 1 Wall., 95, and other cases sustaining the negotiability of municipal bonds." See *Clarke v. City of Janesville*, 1 Biss., 98, where it was held by Miller, J., in 1856, that interest coupons given by a city to a railroad company, while annexed to the bond and referring to it, had no independent vitality, and, even though made payable to bearer, could not be sued on in the Federal courts by an assignee.

<sup>76</sup> *Sere v. Pitot*, 6 Cranch., 332.

<sup>77</sup> *Burnoy v. Baltimore City*, 6 Wall., 280; *McDonald v. Smalley*, 1 Pet., 620; *Brown v. Brown*, 1 Wash. C. C., 429; *Scott v. Lunt*, 7 Pet., 596.

brace the representatives of deceased persons.<sup>78</sup> And where choses in action are assigned, which, by the general principles of law, are not assignable, if the debtor promises to pay the debt to the assignee, an action may be maintained against the debtor by the assignee as for money received to his use.<sup>79</sup>

United States Circuit Court for the Western District of Texas. The Memphis, El Paso and Pacific Railroad Company was incorporated by Texas, February 4, 1856. It was to have, under its charter, as the construction of its road progressed, certain land certificates, and a reservation on each side of the road was granted, and exclusive right given to locate these certificates therein. The company, organized in 1856, accepted and relied upon the grants, and especially the reservation. All conditions precedent were complied with by it. In 1867 and 1868 it issued certain land grant bonds, and at the same time executed and delivered to trustees mortgages to secure same. One of the mortgages covered all the lands acquired or thereafter to be acquired by the company, etc. The land grants and reservation were vested in the mortgagees. The bonds were sold in Paris, France, at par value, the purchasers being assured personally and by advertisement and prospectus, of exclusive right of the company to locate certificates within the reserved territory. The bonds not being paid, at suit of trustee, the circuit court enjoined the company from disposing of its effects, and appointed Gray receiver, etc.

The Constitution of Texas of 1869 contained the following:

"All public lands heretofore reserved for benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates.

"All lands granted to railway companies which have not been alienated by said companies in conformity with the terms of their charter, respectively, and the laws of the State under which the grants were made, are hereby declared forfeited to the State for the benefit of the school fund."

By ordinance of the same convention which framed the Constitution, heads of families actually settled on said reservation, on payment of expenses of survey and patent, could obtain title to eighty acres, and the vacant lands within the reserve were authorized to be sold to heads of families, and declared open to pre-emption settlers.

Under authority of the above constitutional provisions and ordinance, Keuchler, as Commissioner of the General Land Office, issued, and Davis, as Governor of Texas, signed, patents to locations made on certificate other than those issued to the company.

Gray, who was a citizen of New York, as receiver, acting under an order of the court, filed his bill against Keuchler, as Commissioner, and Davis, as Governor, to restrain the further issuance of patents, asserting that the charter of the company constituted a contract, and that the said constitutional provisions and ordinance were void as impairing its obligations, etc. Defendants demurred to the bill upon, among others, the following grounds:

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<sup>78</sup> Chappedelaine v. Decheneaux, 4 Cranch., 306; Sere v. Pitot, 6 Cranch., 332.

<sup>79</sup> Tiernan v. Jackson, 5 Pet., 580.

Where an action is brought to recover the possession of the thing in specie, or damages for its wrongful caption, as when an assignee of a package of bank notes brings replevin therefor, the suit is maintainable, notwithstanding the assignor is disabled to sue for want of proper

1. Because it did not appear from it that the defendants, or either of them, had any direct or personal interest in the lands which were the subject-matters of this suit; but on the contrary, that they were sued in their official capacities only, and that the lands were a part of the public domain of the State of Texas, which was not, and could not be made, a party to this suit.

2. Because it did not appear that while under the amendment 11 to the Constitution of the United States (which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign state"), the court could have no jurisdiction as between the complainant and the State of Texas, jurisdiction existed in a suit against two of the officers of said State in their official capacity alone, to decree portions of the Constitution of the State, which had been accepted by the Congress of the United States, and which the defendants were sworn to obey, void.

The demurrer being overruled and no answer filed, a decree *pro confesso* was taken, and final decree afterwards rendered, perpetually enjoining the defendants, as prayed for in the bill. From the opinion of the court, delivered by Mr. Justice Swayne, we extract as follows:

"A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

"In *Osborn v. The Bank of the United States*, 9 Wheat., 738, three things, among others, were decided:

"1. A circuit court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"2. Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.

"3. In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

"*Dodge v. Woolsey*, 18 How., 331; *The State Bank of Ohio v. Knoop*, 16 *Id.*, 369; *The Jefferson Branch Bank v. Skelly*, 1 Black., 436; *Ohio Life and Trust Company v. Debolt*, 16 How., 432; and *Mechanics' and Traders' Bank v. Debolt*, 18 *Id.*, 380, proceeded upon the same principles, and were controlled by that authority, with



citizenship.<sup>80</sup> An assignee of a mortgage, given to secure a negotiable note, may foreclose, notwithstanding his assignor, on account of citizenship, could not sue.<sup>81</sup> And it may be stated, generally, that where the local law of the State in which the suit is brought author-

respect to the jurisdictional question arising in each of those cases as to the defendant.

"In *Woodruff v. Trapnall*, 10 How., 190, a writ of mandamus, was issued to the proper representative of the State of Arkansas to compel him to receive the paper of the Bank of the State of Arkansas in payment of a judgment which the State had recovered against the relator. The bank was wholly owned by the State, and the claim was made under a clause in the charter which had been repealed. Judgment was given against the respondent. The question of jurisdiction does not appear to have been raised. In *Curran v. The State of Arkansas, The Bank of the State of Arkansas, and others*, 15 *Id.*, 304, it appeared that the bank had become insolvent. A creditor's bill was filed to reach its assets. The objection was taken that the State could not be sued. This court answered that the objection involved a question of local law, and that as the State permitted herself to be sued in her own tribunals, that was conclusive upon the subject. According to the jurisprudence of Texas, suits like this can be maintained against the public officers who appropriately represent her touching the interests involved in the controversy. *Ward v. Townsend*, 2 Texas, 581; *Cohen v. Smith*, 3 *Id.*, 51; *Commissioner General Land Office v. Smith*, 5 *Id.*, 471; *McLelland v. Shaw*, 15 *Id.*, 319; *Stewart v. Crosby*, *Id.*, 547. In the application of this principle there is no difference between the Governor of a State and officers of a State of lower grades. In this respect they are upon a footing of equality. *Whitman v. The Governor*, 5 Ohio State, 528; *Houston and Great Northern Railroad Company v. Kuechler, Commissioner, Supreme Court of Texas*—not yet reported.

"A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same local-

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<sup>80</sup> *Deshler v. Dodge*, 16 How., 622.

<sup>81</sup> *Sheldon v. Sill*, 8 How., 441; *Hill v. Winne*, 1 Biss., 275; *Smith v. Kernochen*, 7 How., 198; *Thaxter v. Hatch*, 6 McLean, 69. If the mortgagor and mortgagee were citizens of different States, it cannot be doubted that an ejectment or bill to foreclose may be brought in the Federal court by a mortgagee residing in a different State. *McDonald v. Smalley*, 1 Pet., 620. *Seckel v. Backhaus*, 7 Biss., 354. But in *Hill v. Winne*, 1 Biss., 275, *supra*, where it was held, under the eleventh section of the Judiciary Act of 1789, that the assignee of a mortgage could not foreclose in the Federal court if the mortgagor and mortgagee were citizens of the same State, it was said that it made no difference that the promissory note accompanying the mortgage was payable to bearer, and hence not within the prohibition of the section, though it was admitted that an action at law might have been prosecuted on the note alone. It has been held that the assignee could maintain ejectment. *Dundas v. Bowler*, 3 McLean, 204.

izes the assignee to sue in his own name, he may so sue in the Federal court, and this, it has been held, notwithstanding, under the law of the State where the transfer was made, the transfer passed only an equitable interest, and the assignee could not, under the law of such State, sue in his own name.<sup>82</sup>

ity. The wise policy of the Constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights. *Ex Parte McNeil*, 13 Wallace, 236. Upon the grounds of the jurisprudence of both the United States and of Texas we hold this bill well brought as regards the defendants.

"That the act of incorporation and the land grant here in question were contracts, is too well settled in this court to require discussion. *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 *Id.*, 164; *Dartmouth College v. Woodward*, 4 Wheat., 518; *State Bank v. Knoop*, 16 How., 369. As such, they were within the protection of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. The ordinance of 1869, and the Constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. *Von Hoffman v. The City of Quincy*, 4 Wall., 535. When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the

<sup>82</sup> *Martin v. Ihmsen*, 21 How., 394. In this case the court say: "The objections to the admission of the paper showing the transfers of the account were equally without foundation. By the law of Pennsylvania, where these transfers were made, Ihmsen would have an equitable interest in the account; but in that State the mere equitable assignee of an account would not sue in his own name, such *chose in action* not being assignable at common law. There the suit would have been brought in the name of Owen & Ihmsen, the original creditors, for the use of Lorenz, Ihmsen, or any other person holding the equitable right to the account. But in Louisiana, where, by the rule of the civil law, there is no such distinction between the legal and equitable title, Ihmsen, as equitable owner, could sustain the suit in his own name, and the assignments admitted to prove his title were properly received." Where an executor in Kentucky proved the will of his testator in that State, and assigned a promissory note due the estate by a citizen of Mississippi, without any probate of the will in the last named State, it was held, inasmuch as by the laws of Mississippi the assignee of a *chose in action* could institute suit thereon in his own name, a suit brought by the assignee could be maintained in the Federal court of Mississippi. *Harper v. Butler*, 2 Pet., 239; *Kirkman v. Hamilton*, 6 Pet., 20; *Irvine v. Lowery*, 14 Pet., 293. The ruling in *Suydam v. Ewing*, 2 Blatchf., 359, to the effect that, in a common law action in the Circuit Court for the Southern District of New York the assignee of a non-negotiable contract has no capacity to sue upon it

SAME.—EXECUTORS, ADMINISTRATORS, TRUSTEES, ETC.—Executors and administrators, appointed in one State, cannot, in the absence of a statute authorizing it, maintain, in their official capacity, actions at law in the Federal courts held in another State. But where the laws

forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. *Curran v. The State of Arkansas*, 15 How., 304.”

Mr. Justice Hunt did not participate in the decision, and Mr. Justice Davis, with whom concurred Mr. Chief Justice Chase, dissenting, said:

“I am constrained to enter my dissent to the opinion and judgment of the court in this case, for the reason that this suit, although in form otherwise, is in effect against the State of Texas. The object which it seeks to obtain shows this to be so, which is to deprive the State of the power to dispose, in its own way, of its public lands, and this object, by the decision just rendered, is accomplished. In my judgment the bill should have been dismissed, because the State is exempt from suit at the instance of private persons, and on the face of the bill it is apparent that the State is arraigned as a defendant.”

From the foregoing cases it will be perceived that the question mentioned in the outset of this note—whether a suit to which a State is not nominally a party may not, looking to its character and objects, be still substantially a suit against a State, and, therefore, inhibited by the eleventh amendment—has been treated as one meriting grave consideration. Since Mr. Chief Justice Marshall’s great judgment in the case of *Cohens v. Virginia*, *supra*, the constitutional power of the Supreme Court to revise the judgments of State courts, notwithstanding the fact that a State was a party to or interested in the suit, has become as firmly established as anything can be in Federal jurisprudence. The cases sustaining the exercise of such jurisdiction are to be found in perhaps every volume of the Supreme Court reports.

We may, therefore, leave out of view, as not bearing directly upon the question under consideration, such of the above cases (*viz*: *Cohens v. Virginia*, 6 Wheat., 264;

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in his own name, the provision of the State Code of Procedure requiring every suit to be brought in the name of the real party in interest not having been adopted by that court; and that this practice applied not only to an action originally commenced in that court, but to one removed into that court from a court of the State, and to all proceedings in such action after its removal, cannot be regarded as law at this time. See *Weed Sewing Machine Company v. Wicks*, 3 Dill., 261; *Opdyke v. Pacific Railroad*, 3 Dill., 55; *City of Lexington v. Butler*, 14 Wall., 282; *Bushnell v. Kennedy*, 9 Wall., 387; *Thompson v. Railroad Companies*, 6 Wall., 134; *Lyon v. Bertram*, 20 How., 149. In *Porter v. Janesville*, 3 Fed. Rep., 617, it is held that municipal bonds may be assigned, etc., and that the words “bearer” or “order” are not essential to negotiability of promissory notes. To the same effect is *Halsey v. Township of New Providence*, 10 Reporter, 454. See also as to negotiability of promissory notes, *Bank of Sherman v. Apperson*, 4 Fed. Rep., 25; *Howenstein v. Barnes*, 5 Dill., 482. Action for money had and received cannot be maintained under an assignment, etc. *Stanley v. Board of Supervisors Albany County*, 5 Fed. Rep., 254.

of a State authorize foreign executors and administrators, upon obtaining a grant of letters therein, to sue in its courts, suits may, in the like manner, be maintained in the Federal courts in such State.<sup>83</sup>

It is not, however, necessary for the executor of a will made in one

*Briscoe v. Bank of Commonwealth*, 11 Pet., 257; *Mechanics' and Traders' Bank v. Debolt*, 18 How., 380; *Jefferson Branch Bank v. Skelly*, 1 Black, 436) as were based upon the appellate jurisdiction of the Supreme Court—this jurisdiction being undisputed—and turn our attention to such as were originally instituted in the courts of the United States. Beginning, then, with *Fowler v. Lindsey*, 3 Dall., 411, *supra*, it will be seen that the question was whether the case was one that ought to be removed by certiorari into the Supreme Court as one over which it had original and exclusive jurisdiction, a State being a party. Upon this point Mr. Justice Washington says: "That a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a State has in the controversy, must be a case in which a State is either nominally or *substantially* the party." The controversy being about grants from different States, the circuit court clearly had jurisdiction. Besides, the learned justice, after referring to the fact that the States were not nominally parties, said: "Nor do I think that they can be regarded as *substantially* the parties to the suits; nay, it appears to me that they are not even *interested or affected*." In the case of the *United States v. Judge Peters*, 5 Cranch, 115, *supra*, Mr. Chief Justice Marshall, while holding that a State could not be made a defendant to a suit brought by an individual, adds: "But it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not *necessarily a defendant*." The opinion admits that the suit was not brought against the State or its treasurer, but against the executrices of Rittenhouse, who were in the possession of the proceeds. "If," says the chief justice, "these proceeds had been the *actual property of Pennsylvania*, however wrongfully acquired, the disclosure of that fact would have presented a case upon which it was unnecessary to give an opinion." He also says: "If the suggestion in this case be examined, it is deemed *perfectly clear that no title whatever* to the certificates in question was vested in the State of Pennsylvania."

In *Osborne v. Bank of United States*, 9 Wheat., 738, *supra*, the fund, which had been wrongfully seized from the Bank of the United States, was kept separate, and not mingled with the other funds belonging to the treasury of the State of Ohio, and relief was prayed against the defendants in their *private* as well as official characters.

The question, as stated by Mr. Chief Justice Marshall,—“whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect *those who are employed* in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws?”—in connection with his statement further on that “it was proper then to make a decree

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<sup>83</sup> *Noonan v. Bradley*, 9 Wall., 394; *Dixon v. Ramsey*, 3 Cranch, 319; *Childress v. Emory*, 8 Wheat., 642; *Brownson v. Wallace*, 4 Blatchf., 465; *Wood v. Gold*, 4 McLean, 577; *Price v. Morris*, 5 McLean, 4; *Curtis v. Smith*, 6 Blatchf., 537.

State, and devising to him lands in another State, to take out letters testamentary in such other State, in order to sue for the lands. In such case, the executor sues as devisee. His right is derived from the will, and not from letters testamentary.<sup>84</sup> Executors and admin-

against the defendants in the circuit court, if the law of the State of Ohio be repugnant to the Constitution or to a law of the United States, made in pursuance thereof, so as to furnish *no authority to those* who took or to those who received the money for which this suit was instituted," furnish the clue to the whole case. It was an attempt on the part of Ohio to impair, under the guise of taxation, one of the institutions of the general government—the United States Bank—notwithstanding it had been previously held in *McCulloch v. Maryland*, 4 Wheat., 316, that such a tax was unconstitutional; and it was rightfully enough held that State officers could not, in such a case, shield themselves from individual responsibility behind an *unconstitutional State law*.

The Bank of the United States v. The Planters' Bank of Georgia, 9 Wheat., 904, *supra*; Bank of Kentucky v. Wister, 2 Pet., 318, *supra*, and Louisville Railroad Company v. Letson, 2 How., 497, *supra*, settle the question that the fact that a State may be a stockholder, or even the sole proprietor of the stock of a corporation, will not defeat a suit brought in the Circuit Court of the United States. "The suit," it is said in the first mentioned case, "is against a corporation, and the *judgment is to be satisfied by the property of the corporation*—not by that of the individual corporators. The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds

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<sup>84</sup> *Lewis v. McFarland*, 9 Cranch., 151; see in this connection *Trecothick v. Austin et al.*, 4 Mason, 16, per Story, Justice; *Rice v. Houston*, 13 Wall., 66. Mr. Justice Davis, delivering the opinion of the court in this case, said: "The question of jurisdiction is the only point in the case. Although in controversies between citizens of different States, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this court, that suits can be maintained in the circuit court by executors or administrators if they are citizens of a different State from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of law. And it makes no difference that the testator or intestate was a citizen of the same State with the defendants, and could not, if alive, have sued in the Federal courts; nor is the status of the parties affected by the fact that the creditors and legatees of the decedent are citizens of the same State with defendants." Citing "*Chappelaine v. Dechenaux*, 4 Cranch, 306-307; *Browne et al. v. Strode*, 5 *Id.*, 303; *Childress's Ex. v. Emory et al.*, 8 Wheat., 642; *Osborn v. Bank of the United States*, 9 *Id.*, 738; *McNutt v. Bland et al.*, 2 How., 9; *Irvine v. Lowry*, 14 Pet., 293; *Huff v. Hutchinson*, 14 How., 586; *Coal Company v. Blatchford*, 11 Wall., 172."

"In this state of the law on this subject, it is not perceived on what ground the right of Houston to maintain these suits can be questioned. He was a citizen of

istrators may, as a general thing, be sued in their official capacity in the courts of the United States in the State of which they are citizens and from which their letters emanate;<sup>85</sup> but, unless they have been duly qualified in the State where suit is brought, it cannot be

an interest in it." The court then proceeds to reason that when a State becomes a partner or stockholder in a trading company it strips itself, so far as the business transactions of the company are concerned, of its sovereign character, and takes the character of a private citizen; that, as a member of a corporation, it does not exercise sovereignty, but exercises only such power in the management of the affairs of the corporation as are expressly given by the incorporating act.

In *Madrazo v. Georgia*, 1 Pet., 110, *supra*, the case made in the libel was for money actually in the treasury of the State, mixed up with its general funds, and for

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Kentucky, had the legal interest in the notes sued on, by virtue of the authority conferred on him by the court in Tennessee, and, therefore, had a right to bring his action in the Federal or State courts at his option.

"It is to be presumed, in the absence of an averment in the pleadings to the contrary, that Houston, when appointed administrator, was a citizen of Kentucky, and if so, the appointment was legal, for the laws of Tennessee do not forbid the probate courts of that State to intrust a citizen of another State with the duties of administering on the estate of a person domiciled at the time of his death in Tennessee.

"But if the fact be otherwise, as seems to be admitted in argument, and Houston were a citizen of Tennessee at the time he got his letters of administration, the liability of the defendants to be sued in the Federal courts remains the same, because there is no statute of Tennessee requiring an administrator not to remove from the State, and the general law of the land allows any one to change his citizenship at his pleasure. After he has in good faith changed it, he has the privilege of going into the United States courts, for the collection of debts due him by citizens of other States, whether he holds the debts in his own right or as administrator."

See also *Griffith v. Frazier*, 8 Craneh, 9.

<sup>86</sup> *Childress v. Emory*, 8 Wheat., 642; *De Valengin v. Duffy*, 14 Pet., 282; *McGill v. Armour*, 11 How., 142; *Barring v. Putnam*, 1 Holmes, 261; *Hill v. Tucker*, 13 How., 458; *Curtis v. Smith*, 6 Blatchf., 537.

Where a testator who held lands as trustee died in South Carolina, and the executor took out letters testamentary in that State, and sold the lands, which were in Kentucky, and then removed his residence to Alabama, it was held that he could be sued in Alabama for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary. *Taylor v. Benham*, 5 How., 233.

In a case where it was objected to the maintenance of a suit against executors because it was not commenced within one year after they gave bonds for the discharge of their trust, as required by the laws of the State, it was held that the defense, to be availed of, "should have been presented at the earliest stage of the proceedings." *Walker v. Walker*, 9 Wall., 743.

maintained.<sup>86</sup> And in exercising jurisdiction against executors and administrators, the Federal courts do not regard as binding upon them State laws which practically deny to creditors the right to sue without respect to the foreign country or State in the Union where

slaves in the possession of the government. The claim was upon the Governor, not by his name, but by his title. Upon the facts of the case, as held by the court, no decree could have been pronounced against him in his *personal character*, and the eleventh amendment prevented any decree against the State. Afterwards, when Madrazo (7 Pet., 627) filed a libel in the Supreme Court of the United States directly against the State of Georgia, it was dismissed because a mere personal suit against a State to recover proceeds in its possession could not be maintained by a private person.

Dodge v. Woolsey, 18 How., 331, *supra*, holds that a State tax collector may be enjoined by the Circuit Court of the United States from enforcing a State law which is in conflict with the Constitution of the United States, because impairing the obligation of a contract. Before this case the unconstitutional laws, from the execution of which State officers had been enjoined, in some way affected the operations or agencies of the general government. Here the private citizen asked protection in a matter in which the government of the United States was in no wise concerned. After a somewhat elaborate discussion of the relations between the States and the general government, and of the duty of the Supreme Court as an ultimate tribunal to determine whether the laws or decisions of States were in conflict with the Constitution of the United States, it was held that Ohio, by a law of that State, had agreed with the bank, and, *quasi ex contractu*, separately, with the shareholders, that it should not be liable over a certain rate of taxation, and that a subsequent law imposing, in violation of this agreement, a greater tax was unconstitutional, as impairing the obligation of a contract. Mr. Justice Catron, Mr. Justice Daniel and Mr. Justice Campbell dissented.

This brings us to Davis v. Gray, 16 Wall., 203, *supra*, in which an injunction, issuing out of the Circuit Court of the United States against certain State officers, was sustained upon the ground that the act enjoined was in pursuance of a State law which impaired the obligation of a contract created by a previous act of incorporation, and, therefore null and void. The opinion in this, as in the preceding case, was not unanimous, Mr. Chief Justice Chase and Mr. Justice Davis both dissenting, because the suit was in effect a suit against the State and deprived the State of its power to dispose of its public domain in its own way.

Whilst, therefore, it may be regarded as settled, that State officers may be enjoined for executing State laws which are unconstitutional, because impairing the obligation of contracts, it by no means follows that cases resting even upon this ground will not,

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<sup>86</sup> Caldwell v. Harding, 5 Blatchf., 501, citing Vaughn v. Northorp, 15 Pet., 1, and other cases. See also Stacy v. Thrasher, 6 How., 44; Security Insurance Company v. Taylor, 2 Biss., 446; Dodge v. Perkins, 4 Mason, 435; Mellus v. Thompson, 1 Cliff., 125; Hill v. Tucker, 13 How., 458; Goodall v. Tucker, 13 How., 469.

the debt was created.<sup>87</sup> It is the citizenship of the executor, administrator, or trustee, and not that of the testator, intestate, heirs, or beneficiaries, to which the courts look in actions at law.<sup>88</sup> Where the parties are, at the time of the institution of the suit, citizens of

when presented, be so essentially suits against the State as to defeat jurisdiction, though the State be not, by name, a party to the record. In *United States v. Judge Peters*, *supra*, Mr. Chief Justice Marshall, as we have seen, in speaking of the duty of the court to decide all cases brought before them by citizens of one State against citizens of a different State, uses the qualifying expression: "*Where a State is not necessarily a defendant.*" And in *Board of Liquidation v. McComb*, 92 U. S., 531, Mr. Justice Bradley, by whom the opinion of the court is delivered, illustrates the impracticability of attempting to enjoin State officers in certain cases, even where it may be claimed that a law impairs the obligation of a contract (p. 536.) He says, in concluding his opinion (p. 541): "The objections to proceeding against State officers by mandamus or injunction are, first, that it is *in effect proceeding against the State itself*; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done.

"A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a

<sup>87</sup> *Suydam v. Broadnax*, 14 Pet., 67. In this case an action was instituted in the Circuit Court of the United States of Alabama by Henry A. Suydam and William Boyd, citizens of New York, against Robert Broadnax and Isaac Newton, as administrators of David Newton, deceased, on a promissory note, given by the decedent to said Suydam and Boyd, and dated New York, September 1, 1835. On the trial of the cause the following questions arose, on which the judges of the circuit court were divided, and the same were certified to the Supreme Court:

"1. Is the plea that the estate of the said decedent is insolvent sufficient in law to abate the said action?

"2. If the said plea be sufficient in law to abate said action, can the Circuit Court of the United States, for the district aforesaid, refer said cause for adjudication and final settlement to a board of commissioners, to be appointed by a county court in one of the counties in the State of Alabama, in pursuance of an act of the Legislature of the said State?"

The court, after construing the statute of Alabama on the subject, and concluding that under it the insolvency of the estate was not a sufficient ground to abate the action, said:

<sup>88</sup> *Bonafer v. Williams*, 3 How., 574; *Rice v. Houston*, 13 Wall., 66; *Clarke v. City of Janesville*, 1 Biss., 98; *Dodge v. Perkins*, 4 Mason, 435; *Walker v. Beal*, 3 Cliff., 155; *Williams v. Ritchey*, 3 Dill., 406; *Huff v. Hutchinson*, 14 How., 586; *McNutt v. Bland*, 2 How., 1.



different States, the death of the plaintiff does not defeat the jurisdiction, though the administrator, who becomes a party, be a citizen of the same State with the defendant.<sup>89</sup> What has been here said with respect to executors, etc., may, in the main, because of the close

mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." Citing "*Osborn v. Bank of the United States*, 9 Wheat., 859; *Davis v. Gray*, 16 Wall., 220."

The right of a State to maintain, as plaintiff, a suit in the Circuit Court of the United States is denied by Mr. Justice Miller (*Wisconsin v. Duluth*, 2 Dill., 406. To the same effect is *The State of North Carolina v. Trustees of University*, 5 Bank Reg., 466). If the doctrine be carried to the extent of holding that when a State intervenes and claims, in its own behalf, affirmative relief, it is practically a suit by the State, it would be driven to seek redress in the Supreme Court of the United States, and in many cases the doors of this court would be closed against it, for a State cannot sue its own citizens in the Supreme Court of the United States.

Again, if it is not within the power of Congress to give *original* jurisdiction to the

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"We do mean, however, to decide this question solely by the interpretation which has been given to the statute.

"It may be put upon other grounds, making our conclusion equally certain. They are such as are connected with the constitutional and legal rights of the plaintiffs to sue in the circuit courts of the United States; and upon the law which, under our system, does not permit an act of insolvency, completely executed under the authority of one State, to be a good bar against the recovery upon a contract made in another State.

"The eleventh section of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one State to sue a citizen of another State in the Circuit Court of the United States, and gives to the circuit court 'original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law and in equity,' etc. It was certainly intended to give to suitors having a right to sue in the circuit court, remedies co-extensive with these rights. These remedies would not be so if any proceedings under an act of a State Legislature, to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the circuit court. The division of opinion, too, as it is presented in the record, is brought within the decisions of this court in *Sturges v. Crowninshield*, 4 Wheat., 122, and *Ogden v. Saunders*, 12 Wheat.,

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<sup>89</sup> *Clark v. Mathewson*, 12 Pet., 164; *Hatfield v. Bushnell*, 1 Blatch., 393; *Trigg v. Conway*, Hems., 711; *Whyte v. Gibbs*, 20 How., 541.

analogy between them, be applied to guardians of infants and persons of unsound mind.<sup>90</sup>

**SAME.—CORPORATIONS.**—For the purpose of jurisdiction, a corporation is deemed to be a citizen of the State where it is created,<sup>91</sup> but

circuit courts of suits against States, notwithstanding the case may be one arising under the Constitution, laws, or treaties of the United States, and if States cannot sue *originally* in said court, as held by Mr. Justice Miller, *supra*, the question suggests itself, can a suit brought by a State against one of its own citizens, in its own courts, be removed (see *Texas v. Texas and Pacific Railroad Company*, 3 Woods's, 308), especially as the jurisdiction acquired by removal is to be considered as *original* and not appellate? *Railway Company v. Whitton*, 13 Wall., 270; *Fisk v. Union Pacific Railroad Company*, 6 Blatch., 362; *Dennistoun v. Draper*, 5 Blatch., 336. There is no question but that Congress may authorize the transfer of cases to which the Federal judicial power extends, and the constitutionality of the transfer of criminal prosecutions by States against officers of the general government, has been

213. It must be remarked, however, that the statute of Alabama is one for the distribution of insolvent estates, not liable to the objections of a general law, and is only brought under the cases mentioned, by an attempt to extend its provisions to a citizen of another State.

"In *Sturges v. Crowninshield*, it is said: 'Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected, are entitled to a hearing. Hence, any bankrupt or insolvent system professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another State be forced into the courts of a State for this investigation; the judgment to be passed, is to prostrate his rights; and on the subject of those rights, the Constitution exempts him from the jurisdiction of the State tribunals, without regard to the place where the contract may originate.'

"In *Ogden v. Saunders*: 'A bankrupt or insolvent law of any State, which dis-

<sup>90</sup> Story's Conf. Laws, sections 504, 504a; Rorer on Inter-State Law, p. 266.

<sup>91</sup> *Railway Company v. Whitton*, 13 Wall., 270; *Insurance Company v. Morso*, 20 Wall., 445; *Louisville, etc., Railroad v. Letson*, 2 How., 497; *Olio and Mississippi Railroad v. Wheeler*, 1 Black, 286; *Manufacturers' National Bank v. Baack*, 2 Abb., U. S., 232; *Muller v. Dows*, 94 U. S., 444. By the Revised Statutes, section 1, "the word 'person' may extend to and be applied to partnerships and corporations." In *Fargo v. Louisville, N. A. and C. Railway Company*, 6 Fed. Rep., 787, joint stock companies are held to come within the reasoning of the rule which makes corporations citizens of the State of their creation. A railroad company, incorporated in one State, consolidating with a railroad company of same name, incorporated in another State, does not destroy the citizenship of either or merge that of the one in the other—they remain, for purposes of jurisdiction, corporations of the States respectively which created them. *Muller v. Dows*, 94 U. S., 444; *Railway Company v. Whitton*, 13 Wall., 270.

may, by transacting business and consenting to be sued in a State other than that of its creation, be sued in the Federal courts of such other State.<sup>92</sup>

The residence of stockholders is immaterial, as in a suit by or against a corporation in the courts of the United States, all the stockholders are, for the purpose of jurisdiction, conclusively presumed to be citizens of the State which created the corporation.<sup>93</sup>

affirmed. *Tennessee v. Davis*, 100 U. S., 257. See also *State v. Grand Trunk Railway Company*, 3 Fed. Rep., 887; *State v. Port*, 3 Fed. Rep., 117; *State of Delaware v. Emerson*, 8 Fed. Rep., 411.

But suppose a State allows itself to be sued in its own courts, as in *Curran v. State of Arkansas*, 15 How., 304. This would not prevent, if a Federal question were involved, the exercise of appellate jurisdiction by the Supreme Court of the United States under the twenty-fifth section of the Judiciary Act, for the obvious reason that the eleventh amendment does not apply to this character of jurisdiction. But could the circuit court acquire, by removal, original jurisdiction of the case? and, if so, would not the exercise of such jurisdiction contravene the eleventh amendment, which says no suit shall be commenced or *prosecuted*, etc.? See *Gale v. Babcock*, 4 Wash., 199.

charges both the person of the debtor and his future acquisitions of property, is not a law impairing the obligation of contracts, so far as respects debts contracted subsequently to the passage of the law. But a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another State, in the courts of the United States; or of any other State than that where the discharge was obtained.<sup>1</sup>

"Though this is a statute intended to act upon the distribution of insolvent estates, and not a statute of bankruptcy; whatever exemption it may give from suit to an executor or administrator of an insolvent estate against the citizens of Alabama, a citizen of another State, being a creditor of the testator or intestate, cannot be acted upon by any proceedings under the statute, unless he shall have voluntarily made himself a party in them, so as to impair his constitutional and legal right to sue an executor or administrator in the Circuit Court of the United States. See also *Union Bank v. Jolly*, 18 How., 503; *Payne v. Hook*, 7 Wall., 425.

<sup>92</sup> *Ex Parte Schollenberger*, 96 U. S., 369; *Wilson Packing Company v. Hunter*, 7 Reporter, 455; *Williams v. Empire Transportation Company*, 6 Reporter, 673; *St. Louis, etc., Railroad v. Indianapolis, etc., Railroad*, 9 Reporter, 103; *Hayden v. Androscoggin Mills*, 9 Reporter, 270. A prohibition by a State that a corporation of another State shall not do business therein, does not prevent such corporation from suing in a national court in the former State, because a State cannot prevent a foreign corporation from suing in such tribunal. *North W. M. L. Insurance Company v. Elliott*, 5 Fed. Rep., 225.

<sup>93</sup> *Muller v. Dows*, 94 U. S., 444; *Ohio and Mississippi Railroad v. Wheeler*, 1 Black, 286.

Municipal, as well as private corporations, may sue and be sued in the Federal courts.<sup>94</sup>

**SAME.—ALIENS.**—Under the CONSTITUTION, as amended, the judicial power is extended to controversies to which a citizen or subject of a foreign state is a party on one side and a citizen of a State is a party on the other side.<sup>95</sup>

Jurisdiction of such controversies is given by statute to the circuit and district courts,<sup>96</sup> and, under certain limitations, aliens are allowed to sue in the Court of Claims.<sup>97</sup> An alien has been defined, in general terms, as “any person who is not a citizen of the United States,”<sup>98</sup>

<sup>94</sup> *Cowles v. Mercer County*, 7 Wall., 118; *Boro v. Phillips County*, 4 Dill., 216; *Town of Weyanwega v. Ayling*, 99 U. S., 112; *City of San Antonio v. Mehaffy*, 96 U. S., 312; *Gelpeke v. City of Dubuque*, 1 Wall., 175; *Hart v. City of Bridgeport*, 13 Blatchf., 289.

In the reports of the Supreme and Circuit Courts of the United States will be found, in addition to the above, numerous municipal bond cases against counties, cities and towns.

<sup>95</sup> See section 2 of article II., and eleventh amendment of Constitution, *ante*, p. 2. See *Jackson v. Twentyman*, 2 Pet., 136. In this case it was sought to maintain the jurisdiction under the eleventh section of the Judiciary Act. (See this section in full, *ante*, p. 15.) The alienage of the plaintiff was stated, not the citizenship of the defendant. The court were of opinion that the eleventh section of the the Judiciary Act should be construed in connection with, and in conformity to the Constitution—that the judicial power was not extended to private suits in which an alien was a party, unless a citizen was the adverse party, and that it was indispensable for the record to show such citizenship. See also *Prentiss v. Brennan*, 2 Blatch., 162; *Hodgson v. Bowerbank*, 5 Cranch, 303. *Picquet v. Swan*, 5 Mason, 35; *Wilson v. City Bank*, 3 Sum., 422. When both parties are aliens the Federal courts have no jurisdiction. *Montalet v. Murray*, 4 Cranch, 46; *Hinckley v. Byrne*, *Deady*, 224. It seems to be an open question whether a native born American citizen, domiciled in a foreign country and carrying on business in a house of trade established there, but never naturalized there, is to be deemed an alien merchant, and as such, entitled to maintain a suit in the Federal courts, touching the business of said house, against a citizen of the State of his birth and of the State where suit is brought. *Wildes v. Parker*, 3 Sum., 593. As to whether declaration of intention to become a citizen is sufficient to prevent an alien from being regarded as a foreign citizen, see *Campbell v. Gordon*, 6 Cranch, 176; *Baird v. Byrne*, 3 Wall., Jr., 1. A citizen may sue an alien although the alien is a consul. *St. Luke's Hospital v. Barclay*, 3 Blatch., 259; *Graham v. Stuekon*, 4 Blatch., 50.

<sup>96</sup> See sections 30 and 42, *infra*.

<sup>97</sup> See section 46, *infra*. See *United States v. O'Keefe*, 11 Wall., 178.

<sup>98</sup> 2 *Story's Cons.*, section 1700.

but the true definition is furnished in the language of the CONSTITUTION a "citizen or subject" of a "foreign state," for a person may not be a citizen of the United States and still cannot sue in its courts as an alien.<sup>99</sup> Nor is it true that all persons born without the jurisdiction and allegiance of the United States are aliens, and all persons born within such jurisdiction and allegiance are citizens, for this would prevent both expatriation and naturalization.<sup>100</sup> In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue.<sup>101</sup> The naturalization of an alien, as before noticed, belongs exclusively to the general government,<sup>102</sup> and when an alien is naturalized he can no longer claim the privilege of alienage.<sup>103</sup> The residence of an alien in the State of which the defendant is a citizen is no objection to jurisdiction.<sup>104</sup>

The privilege of suing is not confined to the alien in whom title or right was first vested, but extends to heirs, mortgagees, trustees, etc.<sup>105</sup> It is also extended to foreign corporations, and, generally speaking, an alien friend may bring, when injured, any personal

<sup>99</sup> Indians are not entitled to sue as aliens. *Carraho v. Adams*, 1 Dill., 344; *McKay v. Campbell*, 2 Sawy., 118.

<sup>100</sup> See Constitution United States, article I., section 8, clause 4. As to the manner in which foreign citizens may become naturalized, see Revised Statutes, section 2165, *et seq.* As to right of expatriation, see Revised Statutes, section 1999. See also *ante*, p. 60. as to citizenship. See also *Inglis v. Trustees et al.*, 3 Pet., 99; *Shanks v. Dupont*, 3 Pet., 242.

<sup>101</sup> *Hansenstein v. Lynham*, 100 U. S., 483. Alienage being from the fact that the alien acquired real estate is not sufficient ground to presume a citizen by taking an oath of fidelity in a court of record. *Blight's Lessee v. Rochester*, 7 Wheat., 535.

<sup>102</sup> See *ante*, p. 65. See also *Scott v. Sandford*, 19 How., 393 (p. 405.) *Lanz v. Randall*, 4 Dill., 425.

<sup>103</sup> *Connolly v. Taylor*, 2 Pet., 556. See also *Houser v. Clayton*, 3 Woods's, 273.

<sup>104</sup> *Breedlove v. Nicolet*, 7 Pet., 413; *Bonaparte v. C. and A. Railroad Company*, Bald., 205.

<sup>105</sup> As to heirs, see *Weems v. George*, 13 How., 190. See also *Orr v. Hodgson*, 4 Wheat., 453; *Harden v. Fisher*, 1 Wheat., 300; *Livingston v. Van Ness*, 1 Paine, 55. As to mortgagees, see *Hughes v. Edwards*, 9 Wheat., 489. As to trustees, see *Chappedelaine v. Decheneaux*, 4 Cranch, 306.

action which a citizen can.<sup>106</sup> Nor does joining an alien with a citizen affect the jurisdiction if the alien is not a material party;<sup>107</sup> neither does the fact that an alien plaintiff, after suit brought, becomes a citizen prevent the removal of the case into the Federal courts.<sup>108</sup>

**§ 12. Jurisdiction—Subject Matter—Constitution, Laws, and Treaties of the United States.**—The cases first enumerated in the CONSTITUTION to which the judicial power is extended, on account of their nature and character, are “all cases in law and equity arising under this CONSTITUTION, the laws of the United States, or treaties made, or which shall be made, under their authority.”<sup>109</sup> We have heretofore explained what is meant by a “case,”<sup>110</sup> and when such a case arises, it is the *character of the case*, and not the character of the party, which gives jurisdiction.<sup>111</sup> But when may a case be said to arise under the CONSTITUTION, laws, or treaties of the United States so as to bring it within the limits of Federal jurisdiction? To answer, generally, “whenever its correct decision depends upon the construction of either,” would give but a very imperfect idea of the Federal questions actually cognizable by the courts of the United States.<sup>112</sup> The appellate jurisdiction of the Supreme Court, and the jurisdiction of all courts inferior to the Supreme Court, can be exercised, as we have already seen, only in such cases and in such manner

<sup>106</sup> *Society, etc., v. Wheeler*, 2 Gallis, 105; *Terry v. Insurance Company*, 3 Dill., 408. See also *Taylor v. Carpenter*, 2 Wood. and M., 1; *Coffeen v. Brumton*, 4 McLean, 516. An alien enemy beneficially interested cannot sue in name of trustee who is not an alien. *Crawford v. The William Penn*, Pet. C. C., 106.

<sup>107</sup> *Ratcan v. Bernard*, 3 Blatch., 244. As to removal of suit, see act of March 3, 1875, where two of the plaintiffs were citizens of the United States and one was an alien. See *Sawyer v. Switzerland M. I. Company*, 14 Blatch., 451.

<sup>108</sup> *Houser v. Clayton*, 3 Woods's, 273. No provision is made for the removal of a criminal case on the ground of alienage. *New Hampshire v. Grand Trunk Railroad Company*, 3 Fed. Rep., 887.

<sup>109</sup> See section 2, article III., *ante*, p. 2.

<sup>110</sup> See section 7, *ante*, p. 29.

<sup>111</sup> See remarks of Mr. Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat., 264, already referred to, *ante*, p. 54.

<sup>112</sup> *Railroad Company v. Mississippi*, 102 U. S., 135.

as Congress, within the grant of judicial power, shall see fit to prescribe.<sup>113</sup>

To ascertain, therefore, whether a case is one arising under the CONSTITUTION, laws, or treaties of the United States, or, in other words, presents a Federal question of which the courts of the United States have jurisdiction, we look to the legislation of Congress on the subject.

As the question mentioned has been most frequently considered in connection with the revisory jurisdiction of the Supreme Court over the judgments of State courts, we shall first notice the statutes and deduce from the authorities some of the more general rules governing this branch of jurisdiction. On writ of error to the highest court of a State in which a decision in the suit could be had, the final judgment or decree of such State court, in any suit, may be affirmed, reversed, or modified by the Supreme Court:—

1. Where the validity of a *treaty*, *statute*, or an *authority* exercised under the United States is drawn in question, and the decision of the State court is *against their validity*.

2. Where the validity of a *statute* of, or *authority* exercised under, any State is drawn in question on the ground of their being *repugnant* to the CONSTITUTION, treaties, or laws of the United States, and the decision of the State court is in *favor of their validity*.

3. Where any *title*, *right*, *privilege*, or *immunity* is claimed under the CONSTITUTION, or any *treaty*, or *statute*, or *commission* held, or authority exercised, under the United States, and the decision of the State court is *against* such title, right, privilege, or immunity specially set up or claimed by either party under such CONSTITUTION, treaty, statute, commission, or authority.<sup>114</sup>

<sup>113</sup> See section 9, *ante*, p. 39, *et seq.*; see also authorities referred to in notes 28 and 29, *ante*, p. 53.

<sup>114</sup> Revised Statutes, section 709. The twenty-fifth section of the Judiciary Act of 1789 (see section in full, *ante*, p. 20) governed the exercise of the appellate jurisdiction of the Supreme Court over the judgments of State courts until the act of February 5, 1867 (14 Statutes at Large, 386), section 2 of which is incorporated into the text of the revision as section 709. The twenty-fifth section of the old Judiciary

Under the law, it will be observed three things must concur:

1. The judgment or decree must be final.<sup>115</sup>
2. It must be the judgment or decree of the highest court of a State in which a decision of the suit could be had.<sup>116</sup>

Act contained a clause which was omitted in the act of 1867, and does not appear in the revision. This clause declared that "no other error should be assigned or regarded as ground of reversal in any such case as aforesaid than such as appeared on the face of the record and immediately respected the before mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." In construing the effect of the change between the two acts, the Supreme Court, in *Murdock v. Memphis*, 20 Wall., 590, laid down the following proposition:

"1. That it is essential to the jurisdiction of this court over the judgment of a State court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State court.

"2. That it must have been decided by the State court, or that its decision was necessary to the judgment or decree, rendered in the case.

"3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

"4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

"5. If it finds that it was rightly decided, the judgment must be affirmed.

"6. If it was erroneously decided against plaintiff in error, then this court must

<sup>115</sup> As to what is a final judgment or decree, see *Commissioners v. Lucas*, 93 U. S., 108; *Atherton v. Fowler*, 91 U. S., 143; *McComb v. Commissioners*, 91 U. S., 1; *Davis v. Cronch*, 94 U. S., 514; *Zeller v. Switzer*, 91 U. S., 487; *Kimball v. Evans*, 93 U. S., 320; *Moore v. Robbins*, 18 Wall., 588; *St. Clair County v. Livingston*, 18 Wall., 628; *Pareels v. Johnson*, 20 Wall., 653; *Rankin v. State*, 11 Wall., 380; *Moses v. Mayor*, 15 Wall., 387; *O'Dowd v. Russell*, 14 Wall., 402; *Verdon v. Coleman*, 18 How., 86; *Roddall v. Bryan*, 24 How., 421; *Pepper v. Dunlap*, 5 How., 51; *Brown v. Union Bank*, 4 How., 465; *Holmes v. Jennison*, 14 Pet., 540; *Weston v. Charleston*, 2 Pet., 449; *Tracy v. Holcomb*, 24 How., 426. The fact that the judgment of the State court was rendered on an equal division of opinion among the State judges does not prevent a review by the Supreme Court of the United States. *Hartman v. Greenhow*, 102 U. S., 672.

<sup>116</sup> As to what is the judgment or decree of the *highest court* of record of a State in which a decision could be had, see *McComb v. Commissioners*, 91 U. S., 1; *Windsor v. McVeigh*, 93 U. S., 274; *Atherton v. Fowler*, 91 U. S., 143; *McGuire v. Commonwealth*, 3 Wall., 387; *Downham v. Alexandria*, 9 Wall., 659; *Gregory v. McVeigh*, 23 Wall., 294; *Gelston v. Hoyt*, 3 Wheat., 246; *Downes v. Scott*, 4 How., 500; *Lessieur v. Price*, 12 How., 59; *Richmond, F. & P. R. Co. v. Louisiana Railroad Company*, 13 How., 71; *Phillips' Practice* (2d ed.), chapter VII., p. 82.



3. One of the Federal questions enumerated in the statute must have been raised and must have been decided *pro* or *con*, as provided in the statute.

Unless the decision of the State court is clearly wrong it will not be overruled; and in exercising the delicate powers given to the Supreme Court over the judgments of State courts the "greatest caution," it has been said, "should be used, and there should be no reversal of such judgments unless the error is manifest."<sup>117</sup> The question will be considered as it comes from the State court.<sup>118</sup> Such question must not only exist on the record, but its decision must be controlling in the disposition of the cause,<sup>119</sup> though it is not suffi-

further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

"7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require."

See also *Railroad Company v. Maryland*, 20 Wall., 643, and *Myrick v. Thompson*, 99 U. S., 291.

<sup>117</sup> *Railroad Company v. Gaines*, 97 U. S., 697; see also *Scott v. Jones*, 5 How., 343. The court, whether the point is made or not, will ascertain, in the first instance, whether the record presents a case in which it may revise the judgment of a State court. *Armstrong v. Treasurer*, 16 Pet., 281.

<sup>118</sup> *Melendey v. Rice*, 94 U. S., 796.

<sup>119</sup> It is said by Mr. Chief Justice Waite, speaking for the court in the case of *The Citizens' Bank v. Board of Liquidation*, 98 U. S., 140: "To give us jurisdiction under section 709, Revised Statutes, it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause." Citing "*Williams v. Oliver*, 12 How., 125; *Klinger v. State of Missouri*, 13 Wall., 257."

The learned chief justice says also, in the case of *Brown v. Atwell*, 92 U. S., 327: "We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that

cient to exclude jurisdiction in a given case, because it involves questions which do not at all depend upon the CONSTITUTION and laws of the United States; *provided*, questions to which the judicial power is extended form an ingredient of the original cause.<sup>120</sup> Nor will the Supreme Court of the United States presume that the Supreme Court of a State decided a case on some other ground not found in the record or suggested in the Supreme Court of such State, where the inferior court of the State decided the case on a single point which did present a Federal question.<sup>121</sup> The revisory jurisdiction of the Supreme Court over the judgments of State courts extends to criminal as well as civil cases,<sup>122</sup> and is not affected by the sum or value in dispute, nor by the fact that a State is a party to or interested in the cause.<sup>123</sup> And where the United States intervened in a suit in a

the judgment as rendered could not have been given without deciding it." Citing "*Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 How., 341; *Lawler et al. v. Walker et al.*, 14 *Id.*, 154; *Railroad Company v. Reek*, 4 Wall., 180; *Parmelee v. Lawrence*, 11 *Id.*, 38."

See also on this subject, the cases of *Bolling v. Lersner*, 91 U. S., 594; *Faslnacht v. Frank*, 23 Wall., 416; *Moore v. Mississippi*, 21 Wall., 636; *Commercial Bank v. Rochester*, 15 Wall., 639; *Rector v. Ashley*, 6 Wall., 142; *The State of Minnesota v. Bachelder*, 1 Wall., 109; *Tennessee v. Davis*, 100 U. S., 257.

<sup>120</sup> *Railroad Company v. Mississippi*, 102 U. S., 135.

<sup>121</sup> *Keith v. Clark*, 97 U. S., 454.

<sup>122</sup> Revised Statutes, section 710. A considerable number of the cases collected in the following note (123) are criminal cases. See *Tennessee v. Davis*, 100 U. S., 257.

<sup>123</sup> *Ashburner v. California*, 103 U. S., 575; *Neal v. Delaware*, 103 U. S., 370; *Hall v. Wisconsin*, 103 U. S., 5; *Louisiana v. New Orleans*, 103 U. S., 521; *Webber v. Virginia*, 103 U. S., 344; *Louisiana v. New Orleans*, 102 U. S., 203; *Railroad Company v. Mississippi*, 102 U. S., 135; *Missouri v. Lewis*, 101 U. S., 22; *South Carolina v. Gaillard*, 101 U. S., 433; *Stone v. Mississippi*, 101 U. S., 814; *Railroad Company v. Alabama*, 101 U. S., 832; *Railroad Company v. Tennessee*, 101 U. S., 337; *Strander v. West Virginia*, 100 U. S., 303; *People v. Weaver*, 100 U. S., 539; *Beer Company v. Massachusetts*, 97 U. S., 25; *Coleman v. Tennessee*, 97 U. S., 509; *Cook v. Pennsylvania*, 97 U. S., 566; *Turnpike Company v. Illinois*, 96 U. S., 63; *Railroad Company v. Maine*, 96 U. S., 499; *Shields v. Ohio*, 95 U. S., 319; *Farrington v. Tennessee*, 95 U. S., 679; *Munn v. Illinois*, 94 U. S., 113; *Stone v. Wisconsin*, 94 U. S., 181; *McCready v. Virginia*, 94 U. S., 391; *People v. Commissioners*, 94 U. S., 415; *Boyd v. Alabama*, 94 U. S., 645; *Chesapeake Railroad Company v. Virginia*, 94 U. S., 718; *Davis v. Indiana*, 94 U. S., 792; *Morgan v. Louisiana*, 93 U. S., 217; *Erie Railroad Company v. Pennsylvania*, 21 Wall., 492; *Morton v. Nebraska*, 21 Wall., 660; *Moore v. Mississippi*, 21 Wall., 636; *Railroad Company v. Maryland*, 21 Wall.,

State court, claiming preference to a fund, it was held that they stood on the same footing as individuals, and that the record must show a Federal question.<sup>124</sup>

In chancery cases, or in any other class of cases where all the evidence becomes a part of the record in the highest court of the State, the Supreme Court of the United States will review the decision of such State court on both the *law* and the *fact*, so far as may be necessary to determine the validity of the right set up under the act of Congress; but in cases where the facts are submitted to a jury and are passed upon by the verdict in a common-law action, it has the same inability to review those facts coming from a State court that it has in a case coming from a Circuit Court of the United States.<sup>125</sup>

Rights protected by the CONSTITUTION, treaties, and laws of the United States are as much within the jurisdiction as rights created by them. For instance, the CONSTITUTION inhibits States from passing any law impairing the obligation of contracts.<sup>126</sup> Whenever, there-

456; Railroad Company v. Maryland, 20 Wall., 643; Aicardi v. State, 19 Wall., 635; Brent v. Maryland, 18 Wall., 430; Rea v. Missouri, 17 Wall., 532; Tax on Foreign Held Bonds, 15 Wall., 300; State Tax on Railway Gross Receipts, 15 Wall., 284; Case of State Freight Tax, 15 Wall., 232; Klinger v. Missouri, 13 Wall., 257; Northern Railroad Company v. People, 12 Wall., 384; People v. Central Railroad Company, 12 Wall., 455; Ward v. Maryland, 12 Wall., 418; Rankin v. State, 11 Wall., 380; Liverpool Insurance Company v. Massachusetts, 10 Wall., 566; Mandelbaum v. People, 8 Wall., 310; Paul v. Virginia, 8 Wall., 168; Provident Institution v. Massachusetts, 6 Wall., 611; Crandall v. State of Nevada, 6 Wall., 35; Cummings v. Missouri, 4 Wall., 277; McGuire v. Commonwealth, 3 Wall., 382; Minnesota v. Bacheider, 1 Wall., 109; New York v. Dibble, 21 How., 366; and Beers v. Arkansas, 20 How., 527.

<sup>124</sup> United States v. Thompson, 93 U. S., 586.

<sup>125</sup> River Bridge Company v. Kansas Pacific Railway Company, 92 U. S., 315.

<sup>126</sup> Constitution, article I., section 10. It does not depend upon the extent of the change which the law effects in the contract. Any deviation in its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligations. Green v. Bidde, 8 Wheat., 1. Legislation which lessens the efficacy of the remedy, which the law in force at the time the contract was made provided for its enforcement, impairs its obligation. Louisiana v. New Orleans, 102 U. S., 203.

fore, the validity of a State Constitution,<sup>127</sup> the ordinances of a State constitutional convention,<sup>128</sup> or the acts of a State legislature<sup>129</sup> are drawn in question as being repugnant to the above provision, and the State court decides in *favor* of their validity, a Federal question is presented. The inhibition just mentioned applies as well to contracts made by legislative act or grant<sup>130</sup> as to ordinary contracts between individuals, and corporations, both municipal and private,<sup>131</sup> may claim its protection. In passing upon the question of whether or not the obligation of a contract is impaired, the Federal courts are not bound by State decisions, but judge of the matter for them-

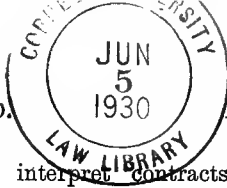
<sup>127</sup> *Keith v. Clark*, 97 U. S., 454; *Davis v. Gray*, 16 Wall., 203; *Railroad Company v. McClure*, 10 Wall., 511; *Dodge v. Woolsey*, 18 How., 331.

<sup>128</sup> *Davis v. Gray*, 16 Wall., 203, and cases in preceding note.

<sup>129</sup> As to what is comprehended by law of a State, see *Williams v. Bruffy*, 96 U. S., 176. A State law under which shares in a national bank are assessed higher than other moneyed capital, contrary to section 5219, Revised Statutes, presents a Federal question. *People v. Weaver*, 100 U. S., 539. See also *The Banks v. The Mayor*, 7 Wall., 16. When a statute of, or authority exercised under, a State is drawn in question on the ground of its repugnance to the Constitution of the United States, or a right is denied under that instrument, the decision of a State court in favor of the validity of such statute or authority, or adverse to the right so claimed, can be revised as presenting a Federal question. *Home Insurance Company v. City Council of Augusta*, 93 U. S., 116. When the question involved is whether a State statute is in violation of the State Constitution, it is not a Federal question. *Walker v. Sauvinet*, 92 U. S., 90; *Withers v. Buckley*, 20 How., 84; *Watson v. Mercer*, 8 Pet., 88; *Dartmouth College v. Woodward*, 4 Wheat., 518. A right must be claimed under the Constitution or laws of the United States, for it is exclusively within the jurisdiction of the State courts to interpret State laws. *Cougdon v. Goodman*, 2 Black, 574.

<sup>130</sup> *Hartman v. Greenhow*, 102 U. S., 672; *Wright v. Nagle*, 101 U. S., 791; *University v. People*, 99 U. S., 309; *Hall v. Wisconsin*, 103 U. S., 5; *Beer Company v. Massachusetts*, 97 U. S., 25; *Murray v. Charleston*, 96 U. S., 432; *Railroad Company v. Maryland*, 21 Wall., 456; and see the celebrated *Dartmouth College Case*, 4 Wheat., 518, and *Fletcher v. Peck*, 6 Cranch, 87.

<sup>131</sup> *University v. People*, 99 U. S., 309; *Beer Company v. Massachusetts*, 97 U. S., 25; *Murray v. Charleston*, 96 U. S., 432. See also cases collected in note 123, *ante*, p. 98.



selves,<sup>132</sup> especially when called upon to interpret contracts of States.<sup>133</sup>

Again, by the fourteenth amendment of the CONSTITUTION, it is declared that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Whenever, therefore, a State makes or enforces any law which abridges the privileges or immunities of citizens of the United States, or attempts to deprive any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws, a Federal question is presented, reviewable by the Supreme Court; *provided*, the State court has decided in *favor* of the validity of the obnoxious law, or *against* the privilege or immunity claimed under the CONSTITUTION and laws of the United States.<sup>134</sup>

<sup>132</sup> *Township of Pine Grove v. Talcott*, 19 Wall., 666. In the opinion of the court in this case it is said: "The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery." *Butz v. Muscatine*, 8 Wall., 579; *Delmas v. Insurance Company*, 14 Wall., 661.

<sup>133</sup> *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

<sup>134</sup> For cases in which the effect of the fourteenth amendment has been discussed, see *Neal v. Delaware*, 103 U. S., 370; *Strander v. West Virginia*, 100 U. S., 303; *Virginia v. Rives*, 100 U. S., 313; *Ex Parte Virginia*, 100 U. S., 339; *Missouri v. Lewis*, 101 U. S., 22. This last mentioned case contains an instructive review of the objects and purposes of the fourteenth amendment, and shows that it was not intended to secure to all persons in the United States the benefit of the *same laws and same remedies*, but that its purpose was to accord to all persons in the same place the equal protection of the laws prevailing there; that it has respect to persons and classes of persons, and means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place under the like circumstances. *United States v. Cruikshank et al.*, 92 U. S., 542;

Not only, as we have seen, is the judicial power extended to treaties, but, by the CONSTITUTION, "all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."<sup>135</sup> The validity of a treaty may be drawn in ques-

*Munn v. Illinois*, 94 U. S., 113; *Slaughter House Cases*, 16 Wall., 36. In *Pennoy v. Neff*, 95 U. S., 714, Mr. Justice Field, delivering the opinion of the court, says:

"Whilst they (the courts of the United States) are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.

"Since the adoption of the fourteenth amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law.

"Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

<sup>135</sup> Constitution, article VI., section 2. The President has power, by and with the advice and consent of the Senate, to make treaties; *provided*, two-thirds of the Senators present concur. Constitution, article II., section 2. It is said in *Foster v. Neilson*, 2 Pet., 253, referring to the general definition of a treaty as a contract between two nations, and not a legislative act: "Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court."

When a treaty is made and ratified the courts will not enquire into the authority of the persons making it. *Doe v. Braden*, 16 How., 635; *Fellows v. Blacksmith*, 19 How., 366. If a Federal question arises under a treaty, and the State court decides

tion in a criminal as well as a civil case.<sup>136</sup> When a State court decides that a title set up or claimed under a treaty is bad, the Supreme Court of the United States may decide that it is good, and in passing upon its validity, is not confined to the abstract construction of the treaty itself;<sup>137</sup> but it is not sufficient to set up merely an outstanding title in a third person.<sup>138</sup>

And, it may be stated generally, that, where titles are involved, the title in litigation must, to present a Federal question, depend upon the Constitution, treaty, or statute of, or commission held, or authority exercised under, the United States,<sup>139</sup> and the party claiming the title must claim it for himself, and not in behalf of a third person, under whom he does not claim.<sup>140</sup> The fact that two citizens of the same State claim title under the same act of Congress does not prevent a review of the judgment of the State court.<sup>141</sup>

Where it is sought to maintain jurisdiction upon the ground that

such question correctly, the Supreme Court of the United States will affirm the judgment without determining the other questions not of a Federal character. *Myrick v. Thompson*, 99 U. S., 291. See *Wilson v. Wall*, 6 Wall., 83, for a case in which it was held that a treaty of the United States did not create a trust, etc. As to mere political obligations created by treaties, and which are not the subject of judicial enforcement, see *Chouteau v. Eckhart*, 2 How., 344; *Taylor v. Morton*, 2 Curtis, 454; *Garcia v. Lee*, 12 Pet., 511; *United States v. Reyes*, 9 How., 127.

<sup>136</sup> *Worcester v. Georgia*, 6 Pet., 515.

<sup>137</sup> *Martin v. Hunter*, 1 Wheat., 304; *Williams v. Oliver*, 12 How., 111; *Smith v. State*, 6 Cranch, 286; *Chouteau v. Eckhart*, 2 How., 344. Where both parties admit the validity of a title claimed under treaty, the litigation does not involve a Federal question, but extends only to a determination of the rights which they have severally acquired under it. *Romie v. Casanova*, 91 U. S., 379. See also *McStay v. Friedman*, 92 U. S., 723. It is independent of a treaty to decide whether or not money awarded under a treaty passed to a trustee in insolvency. Such decision does not present a Federal question.

<sup>138</sup> *Verden v. Coleman*, 1 Black, 472; *Owings v. Norwood*, 5 Cranch, 344; *Henderson v. State*, 10 How., 311; *Hale v. Gaines*, 22 How., 144.

<sup>139</sup> *McStay v. Friedman*, 92 U. S., 723; *Ex Parte Smith* 94 U. S., 455; *Mining Company v. Boggs*, 3 Wall., 304; *Maney v. Porter*, 4 How., 55; *Reichart v. Felps*, 6 Wall., 160; *Lytle v. Arkansas*, 22 How., 193; *Bell v. Hearne*, 19 How., 252; *Cunningham v. Ashley*, 14 How., 377; *O'Brien v. Weld*, 92 U. S., 81; *Silver v. Ladd*, 6 Wall., 440; *Hall v. Jordan*, 15 Wall., 393; *Gill v. Oliver*, 11 How., 529.

<sup>140</sup> *Long v. Converse*, 91 U. S., 105.

<sup>141</sup> *Mathews v. Zane*, 4 Cranch, 382.

the State court decided against the validity of an authority exercised under the United States, something more than a bare assertion of such authority is essential; the authority must have a real existence, derived from competent governmental power.<sup>142</sup>

Much that has been said in relation to the revisory power of the Supreme Court over the judgments of State courts will, so far as the essential elements of a Federal question are concerned, apply to cases of original jurisdiction in the other courts of the United States.

It will not be necessary here to repeat the cases over which, on account of their nature, as arising under the CONSTITUTION, laws, and treaties of the United States, original jurisdiction is given by statute to the circuit and district courts. These will be found enumerated under the heads of the respective courts.<sup>143</sup> But in this connection it may be well to state that by comparing the eleventh section of the Judiciary Act<sup>144</sup> with the first section of the act of March 3, 1875,<sup>145</sup> it will be seen that the former is silent as to cases arising under the CONSTITUTION, laws, etc., whereas the latter is almost identical with the CONSTITUTION. The language of the CONSTITUTION is, "*all cases in law and equity arising under this CONSTITUTION, the laws of the United States, and treaties made, or which shall be made, under their authority.*" The act of 1875 says, "*all suits of a civil nature, at common law or in equity, \* \* arising under the CONSTITUTION or laws of the United States, or treaties made, or which shall be made, under their authority.*" Whenever, therefore, the sum or value in dispute is within the statutory requirement,<sup>146</sup> the circuit court may take original jurisdiction, without regard to the citizenship of

<sup>142</sup> *Millingar v. Hartuppee*, 6 Wall., 258.

<sup>143</sup> As to jurisdiction of circuit court, see sections 31 and 32, and of district court, section 43, *infra*.

<sup>144</sup> See this section in full, *ante*, p. 15.

<sup>145</sup> 18 Statutes at Large, p. 470. See this act in full in notes to section 30, *infra*.

<sup>146</sup> According to the first section of the act of March 3, 1875, which will be found in notes to section 30, *infra*, the matter in dispute must exceed, exclusive of costs, the sum or value of five hundred dollars. See section 13, *infra*. See *United States v. Stiner*, 8 Blatch., 544.



the parties,<sup>147</sup> of any suit of a civil nature at common law or in equity, arising under the CONSTITUTION, laws, or treaties of the United States.<sup>148</sup>

Something more, however, than a mere allegation that the cause of action arises under the CONSTITUTION and laws of the United States is required; it should be shown from the facts stated how it does so arise.<sup>149</sup>

The next among the cases enumerated in the CONSTITUTION, to which the judicial power is extended, on account of their nature, are "all cases of admiralty and maritime jurisdiction."<sup>150</sup> The district court is given, by statute, original jurisdiction of cases of this character.<sup>151</sup>

The assignment to it, however, of "all civil causes of admiralty

<sup>147</sup> Where the jurisdiction depends on the *cause*, and not on the *parties*, the *citizenship* of the parties, as of different States, is immaterial. As, for instance, in patent suits. *Allen v. Blunt*, 1 Blatch., 480; *Evans v. Eaton*, 3 Wheat., 454. The defendant, however, must be sued in the district of which he is an inhabitant, or where he may be found at time of serving process. *Day v. Newark Manufacturing Company*, 1 Blatch., 628. See section 13, *infra*.

<sup>148</sup> See act of March 3, 1875, in notes to section 30, *infra*. See, also, as to definition of "case or suit," *ante*, section 7, p. 29.

<sup>149</sup> *Dowell v. Griswold*, 5 Sawy., 39.

<sup>150</sup> *Dowell v. Griswold*, 5 Sawy., 39. In this case it was also held that the original jurisdiction conferred by act of March 3, 1875, did not include actions arising out of contracts, although, upon trial, a question might arise involving the proper construction of a law of the United States. The distinction between the exercise of original and appellate jurisdiction is also referred to in this case, and it is said, with respect to original jurisdiction, that "A case does not arise under such a law (*i. e.*, act giving original jurisdiction), within the scope of that jurisdiction, unless the very right of the party springs out of or has its origin in such law." Citing *Osborne v. Bank of United States*, 9 Wheat., 738. See also *Hills v. Homton*, 4 Sawy., 195; *Seymour v. Phillips and Colby Co.*, 7 Biss., 460; *Miller v. City of New York*, 13 Blatch., 469; *Tift v. Iron Clad Manufacturing Company*, 16 Blatch., 48; *Stanley v. Board of Supervisors of Albany County*, 6 Fed. Rep., 561. As to what are cases arising under the Constitution and laws of the United States which may be removed from the State courts into the Federal courts, see *Union Pacific Railroad Company v. McComb*, 17 Blatch., 510. See, in connection with this case, *Gold Washing Company v. Keyes*, 96 U. S., 199. See also *Orner v. Saunders*, 3 Dill., 284; *Turton v. Union Pacific Railroad Company*, 3 Dill., 366; *Trafton v. Nongues*, 4 Sawy., 178; *Gay v. Lyons*, 3 Woods's, 56; *Houser v. Clayton*, 3 Woods's, 273.

<sup>151</sup> See section 43, *infra*.

and maritime jurisdiction," is coupled with the words, "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."<sup>152</sup> It is said by Mr. Justice Bradley, delivering the opinion of the court in *The Lottawanna*:<sup>153</sup>

"The general system of maritime law which was familiar to the lawyers and statesmen of the country when the CONSTITUTION was adopted, was most certainly intended and referred to, when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The CONSTITUTION does not define it. It does not declare whether it was intended to embrace the entire maritime law, as expounded in the treaties, or only the limited and restricted system which was received in England; or, lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the CONSTITUTION attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.

"One thing, however, is unquestionable; the CONSTITUTION must have referred to a system of law co-extensive with, and operating uni-

<sup>152</sup> As to effect of this saving clause, see *Schoonmaker v. Gilmore*, 102 U. S., 118; *Steamboat Company v. Chase*, 16 Wall., 522; *The Eddy*, 5 Wall., 481; *The Moses Taylor*, 4 Wall., 411; *The Hine v. Trevor*, 4 Wall., 555; *The Genesee Chief*, 12 How., 443; *Waring v. Clarke*, 5 How., 441; *The Woolsey*, 7 Fed. Rep., 108; *The Liberty No. 4*, 7 Fed. Rep., 226.

<sup>153</sup> 21 Wall., 558. See also *Steamboat Company v. Chase*, 16 Wall., 522; *The Moses Taylor*, 4 Wall., 411; *The Hine v. Trevor*, 4 Wall., 555; *The Genesee Chief*, 12 How., 143; *Smith v. State of Maryland*, 18 How., 71; *Insurance Company v. Dunham*, 11 Wall., 1; *The Eagle*, 8 Wall., 15; *Waring v. Clarke*, 5 How., 441; *The Belfast*, 7 Wall., 624; *The Propeller Commerce*, 1 Black, 574; *McCarty v. Steam Propeller New Bedford*, 4 Fed. Rep., 818; *Holmes v. O. & C. Ry. Co.*, 5 Fed. Rep., 75.

formly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the CONSTITUTION aimed on all subjects of a commercial character, affecting the intercourse of the States with each other or with foreign States."

In an admiralty case, jurisdiction is not affected by the fact that both parties are citizens of the same State.<sup>154</sup>

Lastly, to be mentioned as cases to which the judicial power is extended by the CONSTITUTION, because of their nature, are controversies "between citizens of the same State claiming lands under grants of different States."<sup>155</sup> Jurisdiction of these is given, by the act of March 3, 1875, to the circuit court.<sup>156</sup> It is the grant which passes the legal title to the land, and if the controversy is founded upon the conflicting grants of different States, the judicial power of the courts of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant.<sup>157</sup> Nor does it make any difference that one of the parties claims under a grant emanating from a State which at the time of the original grant was a part of the State under which the other party claims.<sup>158</sup>

**§ 13. Jurisdiction as Affected by Locality and Amount in Controversy.**—The *parties* or the *nature of the cause* may be such as to give jurisdiction, and yet the court may be unable to exercise jurisdiction, except within a particular locality, or where the value of the matter in dispute is equal to or exceeds a certain amount.

**LOCALITY OR PLACE OF TRIAL.**—The several circuits and districts in which courts are established are defined by law,<sup>159</sup> and, as a gen-

<sup>154</sup> *Peyroux v. Howard*, 7 Pet., 324. See also the *Maggie Harmond*, 9 Wall., 435.

<sup>155</sup> See section 2 of article III., *ante*, p. 2. See also section 30, *infra*.

<sup>156</sup> Section 1. See act in full in notes to section 30, *infra*. It will be noticed that the language used in the act is identical with that in the Constitution.

<sup>157</sup> *Colson v. Lewis*, 2 Wheat., 377.

<sup>158</sup> *Town of Pawlet v. Clark*, 9 Cranch, 292.

<sup>159</sup> Revised Statutes, sections 530, *et seq.*, and 604, *et seq.* Many changes have been made by laws passed subsequent to the revision. In some instances new dis-

eral rule, they are restricted in the exercise of jurisdiction, service of process, etc., to the territory assigned them.<sup>160</sup> By the act of March 3, 1875, "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And

districts have been created, and the limits of those previously established altered to conform to the change. See note 24, *ante*, p. 51.

<sup>160</sup> *Pennoyer v. Neff*, 95 U. S., 714. The facts in this case were: Neff brought suit in the Circuit Court of the United States for the District of Oregon, against Pennoyer for the recovery of a tract of land situated in said State. The parties respectively claimed title as follows: Neff under a patent issued to him by the United States, March 19, 1866, and Pennoyer by virtue of a sale made by the sheriff of said county, under an execution sued out upon a judgment against Neff, rendered February 19, 1866, by the circuit court for Multnomah county, in an action wherein he was defendant and J. H. Mitchell was plaintiff. Neff was then a non-resident of Oregon.

In the case of *Mitchell v. Neff*, in the State court, in which judgment was rendered against Neff, and the land in controversy was sold and bought in by Pennoyer, jurisdiction of Neff was obtained by service of summons by publication. In the trial of the case of *Neff v. Pennoyer*, in the Circuit Court of the United States, Pennoyer offered in evidence duly certified copies of the complaint, summons, order for publication of summons, affidavit of service by publication, and the judgment of the State court, in the case of *Mitchell v. Neff*. Among other objections argued to the introduction of these papers were, first, that the judgment in the State court was *in personam*, and appeared to have been given without the appearance of the defendant in the action, or personal service of the summons upon him, and while he was a non-resident of the State, and was, therefore, void; and, second, that said judgment was not *in rem*, and, therefore, constituted no basis of title in the defendant. The case was tried by the court and special verdict given, upon which judgment was rendered in favor of Neff for the land, whereupon Pennoyer sued out writ of error. The Supreme Court, upon the ground that, as the subject-matter of the suit involved merely the determination of the personal liability of the defendant, and he was not brought within its jurisdiction by service of process within the State or his voluntary appearance, affirmed the judgment of the court below.

See also *Thompson v. Whitman*, 18 Wall., 457; *Knowles v. Gaslight and Coal Company*, 19 Wall., 58; *Hill v. Mendenhall*, 21 Wall., 453; *Harkness v. Hyde*, 98 U. S., 476.

But what is said in these cases will not prevent the Circuit Court of the United States, in the trial of a case in the district where the defendant is found, from making such decree as equity may require in cases of contract, or trust, or fraud, although the decree affects lands out of the district. *Massie v. Watts*, 6 Cranch, 148; *Lewis v. Darling*, 16 How., 1.

A bill to abate nuisance can only be brought in State where nuisance exists. *M. & M. R. R. Co. v. Ward*, 2 Black, 485. See also *N. J. R. R. Co. v. M. C. R. R. Co.*, 15 How., 233. Nor can the Circuit Court of the United States decree a sale of land lying in another State by a master acting under its own authority. *Boyce v. Grundy*,

no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving such process or commencing such proceedings, except as hereinafter provided."<sup>161</sup> It is not necessary that a person should be an *inhabitant* of the district at the time of commencing suit; if he be found within the district at the time of serving process, this will suffice to give jurisdiction;<sup>162</sup> but where a person who is temporarily in the district, for the purpose of testifying as a witness or attending to a case in court, or has been decoyed or induced by deception to come within the jurisdiction so as to get service upon him, the service upon him will be set aside.<sup>163</sup> A corporation, it has been held, created by and doing business in a State which contains more than one district, will be considered as residing in all the districts of the State creating it.<sup>164</sup> The inhibition against the bringing of suits

9 Pet., 275. In *Muller v. Dows*, 94 U. S., 444, it was held that a decree foreclosing a mortgage executed by the Chicago and Southern Railroad Company of its entire railroad and franchises, and ordering a sale of them, passed by the Circuit Court of the United States for the District of Iowa, which, in a suit there pending, had jurisdiction of the mortgagor and the trustees in the mortgage, was not invalid because a part of the property ordered to be sold was situated in the State of Missouri.

<sup>161</sup> See section 1 of this act in notes to section 30, *infra*. The exceptions referred to by the words "hereinafter provided" are evidently those mentioned in section 8 of said act (see this section in notes to section 30, *infra*), where absent parties may, under certain circumstances, be brought in by publication. The language of the eleventh section of the Judiciary Act (*ante*, p. 15) was: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against [an inhabitant of the United States], by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." The two acts are alike, with the exceptions that the words in brackets above are omitted in the act of 1875, and in lieu thereof the word "person" is used, and after the word "process," in italics above, the act of 1875 adds "or proceedings."

<sup>162</sup> *Ex Parte Schollenberger*, 96 U. S., 369; *Railroad Co. v. Harris*, 12 Wall., 65.

<sup>163</sup> *Plympton v. Winslow*, 12 Reporter, 740; *Union Sugar Refinery v. Mathiesson*, 2 Cliff., 304; *The Junean Bank v. McSpedan*, 5 Biss., 64; *Bridges v. Sheldon*, 7 Fed. Rep., 17; *Brooks v. Farwell*, 4 Fed. Rep., 166; *Steiger v. Bonn*, 4 Fed. Rep., 17; *Blair v. Turtte*, 5 Fed. Rep., 304.

<sup>164</sup> *Locomotive Engine Safety Co. v. The Erie Railway Company*, 10 Blatch., 292.

against persons in any district other than that of which they may be inhabitants, means that no judgment can be rendered by a circuit court against any defendant who has not been served with process issued against his person in the manner pointed out in the act, unless he has waived the necessity of such service by entering his appearance to the suit.<sup>165</sup> Substituted service by publication against non-resident or absent parties, allowed in some States in purely personal actions, is not permitted in the Federal courts, and can only be resorted to in the cases authorized by statute, where some claim or lien upon real or personal property is sought to be enforced, and the decision of the court will then only affect property of the party within the district.<sup>166</sup>

Where the subject matter of the controversy is local, and lies beyond the limits of the district, where the process of the court cannot reach the *locus in quo*, the circuit court has no jurisdiction;<sup>167</sup> but this will not prevent the court, where it has acquired jurisdiction of the person by his being within the State, from compelling him, by

<sup>165</sup> *Levy v. Fitzpatrick*, 15 Pet., 167; *Toland v. Sprague*, 12 Pet., 300; *Herndon v. Ridgeway*, 17 How., 424; *Kendall v. United States*, 12 Pet., 524.

<sup>166</sup> *Insurance Company v. Bangs*, 103 U. S., 435. As to the invalidity of constructive service to sustain a personal judgment, see *Pennoyer v. Neff*, 95 U. S., 714; *Harkness v. Hyde*, 98 U. S., 476; *Thompson v. Whitman*, 18 Wall., 457; *Knowles v. Gaslight and Coal Company*, 19 Wall., 58; *Hill v. Mendenhall*, 21 Wall., 453.

<sup>167</sup> *Northern Indiana Railroad Company v. Michigan Central Railroad Company*, 15 How., 233. In this case it is said: "The jurisdiction of the Circuit Court of the United States is limited to controversies between citizens of different States, except in certain cases, and to the district in which it sits. In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the circuit court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the circuit court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject-matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the circuit court sitting within it. An action of ejectment cannot be maintained in the district of Michigan, for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted, where the act complained of was not done in the district.

"Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the *locus in quo*."

See also *Boyce v. Grundy*, 9 Pet., 275; *Massie v. Watts*, 6 Cranch, 148.

attachment, to do his duty under his contract or trust, and enforce the decree *in rem*, by his executing and conveying, or otherwise, as justice may require, in respect to lands abroad.<sup>168</sup> And, though a trespass may be committed without the limits of the United States, an action will nevertheless lie in the circuit court for any district in which the defendant may be found, upon process against him, where the citizenship of the respective parties is such as to give jurisdiction.<sup>169</sup> An attachment of the property of a non-resident defendant cannot be maintained where the court has acquired no jurisdiction of the person.<sup>170</sup>

By section 740, Revised Statutes, it is provided: "When a State contains more than one district, every suit not of a local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a

<sup>168</sup> Northern Indiana Railroad Company v. Michigan Central Railroad Company, 15 How., 233; Watkins v. Holman, 16 Pet., 25.

<sup>169</sup> Mitchell v. Harmony, 13 How., 115; McKenna v. Fisk, 1 How., 241.

<sup>170</sup> *Ex Parte* Railway Company, 103 U. S., 794; Chaffee v. Hayward, 20 How., 208. It is said by Lowell, C. J., in Domitzer v. Illinois and St. Louis Bridge Company, 6 Fed. Rep., 217: "It unfortunately is the case that Congress has not seen fit to intrust the circuit courts with power to proceed by attachment of property against an absent defendant unless he is an inhabitant of the district where the suit is brought. Toland v. Sprague, 12 Pet., 300. A recent statute gives these courts jurisdiction to enforce a lien upon or claim to, or remove an encumbrance or lien or cloud upon, the title to real or personal property within the district, though the defendants or some of them, may not be either inhabitants thereof or found therein, first giving notice to the absent defendants. St., 1875, chapter CXXXVII., section 8; 18 St., 472. But this means a lien or title existing anterior to the suit, and not one caused by the institution of the suit itself. These courts, therefore, have a very limited jurisdiction by foreign attachment; an important process, which derives its very name from the absence of the defendant, and which the State courts make use of with advantage to plaintiffs and without injustice to defendants." Where a State contains more than one district, and the suit is not of a local nature, the defendant must be sued in the district in which he resides, and where defendants, not residing in different districts, were sued in a district in which neither resided, and a writ of attachment was directed to another district, where the owner of the property attached resided, the court, on motion, discharged the property from the writ. Seidenbach v. Hollowell, 5 Dill., 382.

duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."

By section 741, that "In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."

And by section 742, that "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

In addition to the foregoing general provisions, Congress has seen fit to legislate specially with respect to certain classes of cases. As, for instance, all pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or where the offender is found.<sup>171</sup> Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.<sup>172</sup> Proceedings on seizures, for forfeiture under any law of the United States, made on the high seas, may be prosecuted in any district into which the property so seized is brought and pro-

<sup>171</sup> Revised Statutes, section 732.

<sup>172</sup> Revised Statutes, section 733.



ceedings instituted. Proceedings on such seizures, made within any district, are required to be prosecuted in the district where the seizure is made, except in cases where it may be otherwise provided.<sup>173</sup> Proceedings for the condemnation of any property, captured as prize, whether on the high seas or elsewhere, out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized or into which it may be taken and proceedings instituted.<sup>174</sup> And all proceedings by any national banking association, to enjoin the comptroller of the currency under the provisions of any law relating to national banking associations, are required to be had in the district where such association is located.<sup>175</sup>

With respect to crimes, it is provided in the CONSTITUTION that "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."<sup>176</sup> And the sixth amendment of the CONSTITUTION declares that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc.<sup>177</sup> By statute, the trial of offenses punishable with death are required to be had in the county where the offense was committed, where that can be done without great inconveni-

<sup>173</sup> Revised Statutes, section 734.

<sup>174</sup> Revised Statutes, section 735.

<sup>175</sup> Revised Statutes, section 736.

<sup>176</sup> Constitution, article III., section 2, clause 3.

<sup>177</sup> See *Ex Parte Milligan*, 4 Wall., 2, pp. 119, 120 and 139.

ence,<sup>178</sup> and the trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, are required to be in the district where the offender is found or into which he is first brought.<sup>179</sup> It is further provided by statute that when any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, enquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed there.<sup>180</sup>

AMOUNT IN CONTROVERSY.—In the exercise of its original jurisdiction, and in the exercise of its appellate jurisdiction, on writ of error to State courts, the Supreme Court of the United States is not controlled by the value of the matter in dispute, or the amount in controversy.<sup>181</sup> And, so, in some cases a writ of error or appeal will lie to the Supreme Court from both circuit and districts courts, and from the Court of Claims, without regard to the amount in controversy.<sup>182</sup> In others, the exercise of appellate jurisdiction is only allowed where the value of the matter in dispute, exclusive of costs, is equal to or exceeds a certain amount.<sup>183</sup> The circuit court, in the exercise of its appellate jurisdiction over the judgments and decrees of the district court,<sup>184</sup> and in the exercise of its original jurisdiction,<sup>185</sup> and its jurisdiction over causes removed<sup>186</sup> to it from State courts, is, in some instances, governed, and, in others, not affected, by the value or amount of the matter in litigation. When it appears from the record, taken as a whole, that the amount actually in controversy between the parties is not sufficient to give jurisdiction, the

<sup>178</sup> Revised Statutes, section 729.

<sup>179</sup> Revised Statutes, section 730.

<sup>180</sup> Revised Statutes, section 731.

<sup>181</sup> See sections 16 and 17, *infra*.

<sup>182</sup> See sections 19, 20, 23, 24 and 26, *infra*.

<sup>183</sup> See sections 21, 22, 25 and 26, *infra*.

<sup>184</sup> See sections 37 and 38, *infra*.

<sup>185</sup> See sections 30 and 31, *infra*.

<sup>186</sup> See sections 32, 33, 34, 35, 36 and 37, *infra*.

Supreme Court will dismiss the writ of error or appeal.<sup>187</sup> "By matter in dispute," says Mr. Justice Field, "is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion, must be considered in determining the question whether this court can take jurisdiction on a writ of error sued out by the plaintiff. It certainly would not be pretended that this court would hear a case where the plaintiff counted solely upon a promissory note of two hundred dollars, simply because he concluded his declaration with an averment that he had sustained damages from its non-payment of over two thousand, and prayed judgment for the latter sum. Reference must be had both to the debt claimed and to the damages alleged, or the prayer for judgment. The damages or prayer for judgment must be regarded, inasmuch as the plaintiff may seek a recovery for less than the sum to which he appears entitled by the allegations in the body of the declaration."<sup>188</sup>

<sup>187</sup> *Banking Association v. Insurance Association*, 102 U. S., 121; *Gray v. Blanchard*, 97 U. S., 564. But where the record shows that the party who objects to the jurisdiction gave \$21,000 for the lands in controversy, the court has jurisdiction. *May v. Sloan*, 101 U. S., 231.

<sup>188</sup> *Lee v. Watson*, 1 Wall., 337. This case was affirmed in *Shacker v. Hartford Fire Insurance Company*, 93 U. S., 241. In considering this subject, in *Kanouse v. Martin*, 15 How., 198, Mr. Justice Curtis says: "The words 'matter in dispute,' in twelfth section of the Judiciary Act, do not refer to disputes in the country, or the intentions or expectations of the parties concerning them, but to the claim presented on the record to the legal consideration of the court. What the plaintiff thus claims, is the matter in dispute, though that claim may be incapable of proof, or only in part well founded. So it was held under this section of the statute, and in reference to the right of removal, in *Gordon v. Longest*, 16 Pet., 97; and the same construction has been put upon the eleventh and twenty-second sections of the Judiciary Act, which makes the jurisdiction of this court and the circuit court dependent on the amount or value of the matter in dispute. The settled rule is that until some further judicial proceedings have taken place, showing upon the record that the sum demanded is not the matter in dispute, that sum is the matter in dispute in an action

The matter in dispute must be money, or some right, the value of which can be calculated or ascertained.<sup>189</sup>

As a test of jurisdiction in actions of tort, we look to the damages claimed by the plaintiff in his writ or laid in his declaration.<sup>190</sup> In ejectment, we look to the value of the land, which must be averred to exceed five hundred dollars.<sup>191</sup> Notwithstanding the rule that the allegation in the declaration must be taken, generally, as fixing the

for damages. *Green v. Liler*, 8 Cranch, 229; *Wise v. The Colorado Turnpike Company*, 7 Cranch, 276; *Gordon v. Ogden*, 3 Pet., 33; *Smith v. Honey*, 3 Pet., 469; *Den v. Wright*, 1 Pet. C. C. R., 64; *Miner v. Dupont*, 2 Wash. C. C. R., 463; *Sherman v. Clark*, 3 McLean, 91."

The demand of the plaintiff is not alone to be regarded; the nature of the case must guide the judgment of the court, and whenever the law makes a rule, that rule must be pursued. *Wilson v. Daniel*, 3 Dall., 401.

*Culver v. County of Crawford*, 4 Dill., 239. Under the law, the United States may maintain a creditor's bill where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500. *United States v. Stenier*, 8 Blatchf., 544.

In *King v. Wilson*, 1 Dill., 555, where the plaintiffs, several in number, joined in a bill to restrain the collection of a tax, Dillon, C. J., said: "On the question of *jurisdiction* I am inclined to think that while it may be true that different tax-payers may join in such a bill, yet, that, as to each so entitled to join, there must be in dispute an amount exceeding the sum or value of \$500; in other words, where the interest of each is in its nature several, and the whole amount of tax demanded or demandable of each is less than that sum, so that neither one would have the right to bring the bill alone, the requisite amount to confer jurisdiction cannot be had by aggregating the several amounts of tax each is liable to pay. (See Judiciary Act, section 11; *Adams v. Board of Commissioners*, *McCahon R.*, 235.)"

A declaration with eleven counts, each count being a distinct coupon for \$50, shows a case, as to amount, within the jurisdiction of the circuit court. *Judson v. Macon County*, 2 Dill., 213. See *Sherman v. Clark*, 3 McLean, 91.

<sup>189</sup> *Barry v. Merecin*, 5 How., 103; *DeKrafft v. Barney*, 2 Black, 704; *Pratt v. Fitzhugh*, 1 Black, 271; *Ritchie v. Mauro*, 2 Pet., 243. The above were cases involving the right to guardianship of an infant. See *Sparrow v. Strong*, 3 Wall., 97, where a mining claim was held of sufficient value, though the land in which the mine existed had never been surveyed or brought into market. See also *United States v. Addison*, 22 How., 174, where the controversy was the right to an office, the salary of which was \$1000 per annum, payable monthly, and the duration of which was two years, and the jurisdiction was sustained. See further as to "matter in dispute," *United States v. Moore*, 3 Cranch, 159.

<sup>190</sup> *Gordon v. Longest*, 16 Pet., 97; *Murphy v. Howard*, *Hemps.*, 205; *Kanouse v. Martin*, 15 How., 198; *Muns v. Dupont*, 2 Wash. C. C., 463; *Ladd v. Tudor*, 3 Wood. and Min., 325.

<sup>191</sup> *Lanning v. Dolph*, 4 Wash. C. C., 624.

amount or value for the purposes of jurisdiction, yet the subsequent pleading, as, for instance, by way of set-off or counter-claim, may so change the original character of the suit as to involve an amount and value much greater than that originally claimed by the plaintiff.<sup>192</sup>

And where the equitable, as well as the legal considerations involved in the cause, are to be considered, and the effect of the judgment is to adjust the legal and equitable claims of parties to the subject of the suit, though the suit be for less than the stated sum, still

<sup>192</sup> *Ryan v. Bindley*, 1 Wall., 66. The Judiciary Act provides (section 22, *ante*, p. 19) that final judgments and decrees in civil actions, and suits in equity, in a *circuit* court, when the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be re-examined and reversed or approved in the *Supreme Court*. With this law in force, Bindley sued Ryan in assumpsit in the *Circuit Court* for the Southern District of Ohio, and laid his damages at one thousand dollars. Ryan, however, put in a plea that Bindley owed him four thousand dollars, which sum he claimed a right to set-off against Bindley's demand, and to have judgment against Bindley for the excess; a sort of defense and judgment allowed by the laws of Ohio, and the practice of the *Circuit Court* of the United States for its districts, which therein, by rule of court, had adopted the practice of the State tribunals. The verdict found \$575.85 for the plaintiff.

"In this case," says Mr. Justice Davis, by whom the opinion of the court was delivered, "Ryan interposed a notice of set-off, and insisted that Bindley owed him four thousand dollars for goods sold and money lent, which he claimed the right to set-off against Bindley's demand, and to recover against Bindley a judgment for the excess. By the laws of Ohio such a defense is permitted, and if the defendant succeeds in proving his set-off, and it is larger than the plaintiff's claim, he is entitled to a judgment for the excess. The parties are concluded by the judgment, and cannot again litigate the same subject-matter, unless the judgment should be reversed on appeal or writ of error to the *Supreme Court*. This law of set-off, or counter-claim, and the practice under it, has been adopted as a rule of court by the *Circuit Court* of the United States for the districts of Ohio. The plea in this case was, therefore, proper, and after it was interposed the matter in dispute rightfully exceeded the sum of two thousand dollars, exclusive of costs, and, as the plaintiff had judgment, it is plain that the defendant had a right to sue out his writ of error."

A party cannot elect to make a set-off which will reduce the decree to an amount insufficient to authorize an appeal and at the same time save his right of appeal. *Sampson v. Welsh*, 24 How., 207.

See also *Thompson v. Butler*, 95 U. S., 694. In this case it appears that in a suit in the circuit court, where the defendant pleaded neither a set-off nor a counter-claim, the plaintiff remitted so much of a verdict in his favor as was in excess of \$5000, and took judgment for the remainder "in coin." The defendant sued out a writ of error, and it was held that the amount in controversy, whether payable in coin or any other kind of money, was sufficient to give this court jurisdiction.

the jurisdiction will be maintained, if the property be of sufficient value.<sup>193</sup>

It is not the penalty of the bond, but the sum due upon the condition of the bond; or, if covenant be brought thereon, the amount claimed for damages, which the court will look to in determining the question of jurisdiction.<sup>194</sup>

In replevin, if it be of goods distrained for rent, the amount for which avowry is made is the value of the matter in controversy; and if the writ be issued to try the title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in controversy.<sup>195</sup>

In a partition suit, it is the value of the undivided part in controversy, and not the value of the whole land, which determines the appellate jurisdiction of the Supreme Court.<sup>196</sup>

<sup>193</sup> *Stinson v. Dousman*, 20 How., 461, citing *Bennett v. Butterworth*, 8 How., 124. See also *Sewall v. Chamberlin*, 5 How., 6.

<sup>194</sup> *United States v. McDowell*, 4 Cranch, 316; *Martin v. Taylor*, 1 Wash. C. C., 1; *Postmaster v. Cross*, 4 Wash. C. C., 326.

<sup>195</sup> *Peyton v. Robertson*, 9 Wheat., 527. See also *Pierce v. Wade*, 100 U. S., 444, where a judgment was rendered in favor of plaintiff for a portion of the property delivered under the writ of replevin, and a judgment was at the same time rendered in favor of the defendant for the residue or its value, the same not being \$5000, and the plaintiff sued out a writ of error to the Supreme Court, and it was held that the writ must be dismissed for want of jurisdiction. In the opinion it is said: "We have always held that when a case is brought here by the defendant below, the amount of the recovery against him is the measure of our jurisdiction, except when he has asked affirmative relief and that has been denied. The same rule is applicable to plaintiffs in replevin suits where the defendant gets judgment for a return of property, taken and delivered under the writ, or its value."

In *Troy v. Evans*, 97 U. S., 1, it is held that the amount of the judgment below against a defendant in an action for money is *prima facie* the measure of the jurisdiction of the Supreme Court in his behalf, and that this *prima facie* case continues until the contrary is shown, and if jurisdiction is involved because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds \$5000, exclusive of interest or costs.

<sup>196</sup> *McCarthy v. Provost*, 103 U. S., 673. For cases in which the interests of the parties were several, see *Seaver v. Bigelows*, 5 Wall., 208; *Shields v. Thomas*, 17 How., 3; *Oliver v. Alexander*, 6 Pet., 143; *Stratton v. Jarvis*, 8 Pet., 4; *Clifton v. Sheldou*, 23 How., 481; *Rodd v. Heartt*, 17 Wall., 355; *Terry v. Hatch*, 93 U. S., 44.

Neither the costs of suit nor the interest accruing on the judgment subsequent to its rendition will be considered in estimating the amount.<sup>197</sup> But where the interest is part of the claim in litigation, the rule is different.<sup>198</sup> The amount to give jurisdiction must not be merely equal to, but must *exceed*, that mentioned in the statute.<sup>199</sup>

**§ 14. Exclusive Jurisdiction.**—The Federal courts being, as so frequently observed, all limited in their nature, and deriving their authority to hear and determine causes, not from a national unwritten common law, but solely from the CONSTITUTION of the United States and acts of Congress passed in pursuance thereof, we naturally look to the source of jurisdiction itself to ascertain whether, in a given case, it is exclusive or concurrent. By turning to the statute, we find that the courts of the United States have, exclusive of State courts, jurisdiction:—

1. Of all crimes and offenses cognizable under the authority of the United States.<sup>200</sup>
2. Of all suits for penalties and forfeitures incurred under the laws of the United States.<sup>201</sup>
3. Of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of common-law remedy, where the common law is competent to give it.<sup>202</sup>
4. Of all seizures under the laws of the United States, on land or on waters, not within admiralty and maritime jurisdiction.<sup>203</sup>
5. Of all cases arising under the patent-right or copyright laws of the United States.<sup>204</sup>
6. Of all matters and proceedings in bankruptcy.<sup>205</sup>

<sup>197</sup> *Western Union Telegraph Company v. Rogers*, 93 U. S., 565; *Walker v. United States*, 4 Wall., 163; *Gordon v. Ogden*, 3 Pet., 33.

<sup>198</sup> *Merrill v. Petty*, 16 Wall., 338.

<sup>199</sup> *Walker v. United States*, 4 Wall., 163.

<sup>200</sup> Revised Statutes, section 711, paragraph 1.

<sup>201</sup> *Id.*, paragraph 2.

<sup>202</sup> *Id.*, paragraph 3.

<sup>203</sup> *Id.*, paragraph 4.

<sup>204</sup> *Id.*, paragraph 5.

<sup>205</sup> *Id.*, paragraph 6.

7. Of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.<sup>206</sup>

But where exclusive jurisdiction is neither express nor implied, the State courts have concurrent jurisdiction where, by their constitution, they are competent to take it.<sup>207</sup> And it is not within the power

<sup>206</sup> Revised Statutes, section 711, paragraph 7.

<sup>207</sup> *Clafin v. Houseman*, 93 U. S., 130. The opinion of the court in this case, delivered through Mr. Justice Bradley, is an exceedingly instructive one, and is well worthy of careful perusal. After reviewing the previous decisions, and holding that under the bankrupt act of March 2, 1867, as it stood before the revision, an assignee might sue in the State courts to recover the assets of the bankrupt, no exclusive jurisdiction having been given to the courts of the United States, he says:

"Where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the State courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or corporation created by the United States authority may be enabled to sue in such courts. Nothing in the Constitution, fairly considered, forbids it.

"The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises,—sometimes with a leaning in one direction and sometimes in the other,—but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

"When we consider the structure and true relations of the Federal and State governments, there is really no just foundation for excluding the State courts from all such jurisdiction.

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like



of a Circuit Court of the United States to revise or set aside the final decree rendered by a State court which had complete jurisdiction of the parties and subject-matter.<sup>208</sup> Nor is it within the power of any court of the United States to grant an injunction to stay proceedings in any court of a State, except in cases where injunctions may be authorized by any law relating to bankruptcy.<sup>209</sup> And so, on the other hand, State courts cannot interfere, by injunction, with pro-

character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Justice Field, in *The Moses Taylor*, 4 Wall., 429; and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat., 334; and of Mr. Justice Swayne, in *Ex Parte McNeil*, 13 Wall., 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How., 506: and hence the State courts have no power to revise the action of the Federal courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

<sup>208</sup> *Nougue v. Clapp*, 101 U. S., 551, citing *Randall v. Howard*, 2 Black, 585.

<sup>209</sup> Revised Statutes, section 720; *Dial v. Reynolds*, 96 U. S., 340; *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Jenness*, 7 How., 612; *Watson v. Jones*, 13 Wall., 679; *Chaffin v. City of St. Louis*, 4 Dill., 19; *Moore v. Holliday*, 4 Dill., 52; *Haines v. Carpenter*, 91 U. S., 254. But an injunction may be granted where the jurisdiction of the Federal court has first attached. *French v. Hay*, 22 Wall., 250; *Fisk v. Union Pacific Railroad Company*, 10 Blatch., 518. As to restraining State officers, see note 55, *ante*, p. 59.

ceedings in the Federal courts,<sup>210</sup> nor enjoin officers of the United States in the discharge of their duties under the laws of Congress.<sup>211</sup>

Where a grant of original jurisdiction is exclusive, as of cases of admiralty, to the district courts, State statutes which attempt to confer upon State courts remedies for marine contracts, by proceedings strictly *in rem*, are void, except as to cases arising on the lakes and their connecting waters.<sup>212</sup>

As between the several courts of the United States, the Supreme Court has exclusive original jurisdiction of all controversies of a civil nature where a *State is a party*, except between a State and its citizens, or between a State and citizens of other States, or aliens, and also exclusive jurisdiction of all suits or proceedings *against* ambassadors or other public ministers, or their domestics or domestic servants.<sup>213</sup>

With respect to the circuit court, it has exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law;<sup>214</sup> and in civil cases, it

<sup>210</sup> Riggs v. Johnson County, 6 Wall., 166; United States v. Keokuk, 6 Wall., 514; Schuyler v. Pelissier, 3 Edwards' Chancery, 191; Coster v. Griswold, 4 *Id.*, 364; Phelan v. Smith, 8 Cal., 520. As to qualification of rule where jurisdiction of State court has first attached, see Akerly v. Vilas, 15 Wis., 401; Home Insurance Company v. Howell, 9 C. E. Green, 238. Where jurisdiction in the Federal court has terminated, so that no case is pending, State court may have jurisdiction of matter arising out of same general subject. Day v. Gallup, 2 Wall., 97.

<sup>211</sup> Brewer v. Kidd, 23 Mich., 440.

<sup>212</sup> The Hine v. Trevor, 4 Wall., 555. Power is given, in section 8 of article I. of the Constitution, to Congress "To exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular States and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." Where jurisdiction has been ceded by a State over a particular territory to the general government, such jurisdiction is exclusive. *Ex Parte Hebard*, 4 Dill., 380. See also United States v. Davis, 5 Mason, 356; United States v. Stahl, Woolw., 192; United States v. Tierney, 1 Bond, 571; United States v. Ames, 1 Wood. and M., 76.

<sup>213</sup> See section 16, *infra*. As to States, see *ante*, p. 58, and as to ambassadors, etc., *ante*, p. 55.

<sup>214</sup> Revised Statutes, section 629, paragraph 20. See also section 39, *infra*, and *ante*, p. 44, note.

may be said, generally, that its jurisdiction is exclusive, except where, in express terms or by necessary implication, concurrent jurisdiction is given to the district courts.<sup>215</sup> The jurisdiction of the district courts is made exclusive of the circuit courts of all civil causes of admiralty and maritime jurisdiction, saving, as before noticed, to suitors in all causes the right of a common-law remedy, where the common law is competent to give it;<sup>216</sup> and of all seizures, on land and on waters, not within admiralty and maritime jurisdiction, except in the particular causes where jurisdiction of such causes and seizures is given to the circuit courts; and also of all prizes brought into the United States, except as provided in paragraph 6 of section 629 of the Revised Statutes.<sup>217</sup>

**§ 15. Concurrent Jurisdiction.**—Owing to the very intimate relation between the subject of this and of the preceding section, what is said in the one will, in a great measure, apply to the other. Among the most important, and certainly among the most delicate, questions in Federal jurisprudence with which our courts, both Federal and State, have had to deal are those relating to concurrent jurisdiction. The tribunals of each have particular spheres, within which each may be said to be supreme. The failure to observe this has, in some instances, led to unseemly conflicts. And when we reflect that, with the exception of a few special cases, we are compelled to look for the protection and enforcement of our various rights and privileges, whether derived from State Constitutions, State laws, or the common law as adopted by States, exclusively to State tribunals, and that even with respect to rights and privileges guaranteed by the CONSTITUTION and statutes of the United States, the Federal courts are, in many instances, without jurisdiction, because none has been conferred by Congress, and that a large proportion of all civil causes in the courts

<sup>215</sup> See section 30, *et seq.*, *infra*.

<sup>216</sup> Revised Statutes, section 536, paragraph 8. See sections 42 and 43, *infra*.

<sup>217</sup> Paragraph 6 of section 629, Revised Statutes, reads: "Of all proceedings for the condemnation of property taken as prize in pursuance of section 5308, title 'Insurrection.'" See sections 5308 and 5309.

of the United States are cases of concurrent jurisdiction, the solicitude and concern which this character of jurisdiction has occasioned will readily be appreciated.

Clause 2 of article VI. asserts the supremacy of the Federal Constitution, laws and treaties, in the following words: "THIS CONSTITUTION, AND THE LAWS OF THE UNITED STATES, WHICH SHALL BE MADE IN PURSUANCE THEREOF, AND ALL TREATIES MADE, OR WHICH SHALL BE MADE, UNDER THE AUTHORITY OF THE UNITED STATES, SHALL BE THE SUPREME LAW OF THE LAND, AND THE JUDGES IN EVERY STATE SHALL BE BOUND THEREBY, ANYTHING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOTWITHSTANDING."

The reserved rights and powers of the several States are thus recognized and preserved by the tenth amendment: "THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY, OR TO THE PEOPLE."

And the fourteenth amendment contains the inhibition, that "No STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

Referring to the second clause of Article VI., *supra*, touching the supremacy of the Constitution of the United States, etc., Mr. Chief Justice Taney, speaking for an undivided court, in the leading case of *Ableman v. Booth*,<sup>218</sup> says:

<sup>218</sup> 21 How., 506. See also case of *Buck v. Colbath*, 3 Wall., 334. The facts of this case were that Colbath sued Buck in one of the State courts of Minnesota, in an action of trespass for taking goods. Buck pleaded in defense that he was Marshal of the United States for the District of Minnesota, and that having in his hands a writ of attachment against certain parties whom he named, he levied the same upon the goods, for taking which he was now sued by Colbath. But he did not aver that they were the goods of the defendants in the writ of attachment.

On the trial Colbath made proof of his ownership of the goods, and Buck relied solely on the fact that he was marshal and held the goods under the writ in the attachment suit.

"But the supremacy thus conferred on this government could not peaceably be maintained unless it was clothed with judicial power equally paramount in authority to carry it into execution, for if left to the courts of justice of the several States, conflicting decisions would

The court refused to instruct the jury that the defense thus set up was a sufficient one; and the plaintiff had a verdict and judgment. This judgment was affirmed on error in the Supreme Court of Minnesota, and rightly so, as held by the Supreme Court of the United States. Mr. Justice Miller, delivering the opinion of the court, says:

"There seems to be reason to doubt that the case comes within the provisions of the twenty-fifth section of the Judiciary Act. The defendant claimed the protection of 'an authority exercised under the United States,' and the decision was against the protection thus claimed; or, in other words, against the validity of that authority, as a protection to him in that action. Whether the authority which he thus set up was valid to protect him, is a question for this court to decide finally, and is properly before us under the writ of error to the Supreme Court of Minnesota.

"Upon the merits of the case, the plaintiff in error relies mainly on the case of *Freeman v. Howe*, decided by this court, and upon the opinion by which the court sustained the decision.

"That was a case like this in every particular, with the single exception, that when the marshal had levied the writ of attachment on certain property, a writ of replevin was instituted against him in the State court, and the property taken out of his possession; while in the present case the officer is sued in trespass for the wrongful seizure.

"In that case it was held, that although the writ of attachment had been wrongfully levied upon the property of a party not named in the writ, the rightful owner could not obtain possession of it by resort to the courts of another jurisdiction.

"It must be confessed that this decision took the profession generally by surprise, overruling, as it did, the unanimous opinion of the Supreme Court of Massachusetts—a court whose opinions are always entitled to great consideration—as well as the opinion of Chancellor Kent, as expressed in his *Commentaries*, volume I., 410.

"We are, however, entirely satisfied with it, and with the principle upon which it is founded; a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in *Taylor v. Caryl*, 20 How., 583; and *Hogan v. Lucas*, 10 Pet., 400, both of which assert substantially, the same doctrine.

"A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same

unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the CONSTITUTION, and laws, and treaties of the United States, and the powers granted to the Federal government, would soon

source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and subject-matter of the suit.

"This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions.

"It is upon this ground that the court, in *Day v. Gallup*, held that this court had no jurisdiction of that case. The property attached had been sold, and the attachment suit ended, when the attaching officer and his assistants were sued, and we held that such a suit in the State court, commenced after the proceedings in the Federal court had been concluded, raised no question for the jurisdiction of this court.

"It is obvious that the action of trespass against the marshal in the case before us, does not interfere with the principle thus laid down and limited. The Federal court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached, and have its execution satisfied, without any disturbance of its proceedings, or any contempt of its process. While at the same time, the State court could proceed to determine the questions before it involved in the suit against the marshal, without interfering with the possession of the property in dispute.

"How far the courts are bound to interfere for the protection of their own officers, is a question not discussed in the case of *Freeman v. Howe*, but which demands a passing notice here. In its consideration, however, we are reminded at the outset, that property may be seized by an officer of the court under a variety of writs, orders, or process of the court. For our present purpose, these may be divided into two classes:

"1. Those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of *replevin* at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts, by which the *res* is brought before it for its action.

"2. Those in which the officer is directed to levy the process upon property of

receive different interpretations in different States, and the government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a government that it should have the power of establish-

one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken. Of this class are the writ of attachment, or other mesne process, by which property is seized before judgment to answer to such judgment when rendered, and the final process of execution, *elegit*, or other writ, by which an ordinary judgment is carried into effect.

"It is obvious, on a moment's consideration, that the claim of the officer executing these writs, to the protection of the courts from which they issue, stands upon very different grounds in the two classes of process just described. In the first class he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts.

"And in addition to this, in many cases the court which issued the process will interfere directly to protect its officers from being harassed or interfered with by any person, whether a party to the litigation or not. Such is the habitual course of the court of chancery, operating by injunction against persons who interfere by means of other courts. And instances are not wanting, where other courts have in a summary manner protected their officers in the execution of their mandates.

"It is creditable, however, to the respect which is paid to the process of courts of competent jurisdiction in this country, that the occasion for the exercise of such a power is very rare.

"In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. First, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; secondly, that it is property which, by law, is subject to be taken under the writ; and thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all those particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else.

"In the case before us, the writ under which the defendant justified his act and now claims our protection, belongs to this latter class. Yet the plea on which he relied contains no denial that the property seized was the property of plaintiff, nor

ing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the CONSTITUTION and laws, and treaties of the United States, whether in a State court or

any averment that it was the property of either of the defendants in the attachment suit, or that it was in any other manner subject to be taken under that writ.

"Seizing upon some remarks in the opinion of the court in the case of *Freeman v. Howe*, not necessary to the decision of that case, to the effect that the court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, and that the Federal court could not permit the State court to withdraw from the former the decision of such issues, the counsel for plaintiff in error insists that the present case comes within the principle of those remarks.

"It is scarcely necessary to observe that the rule thus announced is one which has often been held by this and other courts, and which is essential to the correct administration of justice in all countries where there is more than one court having jurisdiction of the same matters. At the same time, it is to be remarked that it is confined in its operation to the parties before the court, or who may, if they wish to do so, come before the court and have a hearing on the issue so to be decided. This limitation was manifestly in the mind of the court in the case referred to, for the learned judge who delivered the opinion goes on to show, that persons interested in the possession of the property in the custody of the court, may, by petition, make themselves so far parties to the proceedings as to have their interests protected, although the persons representing adverse interests in such case do not possess the qualification of citizenship necessary to enable them to sue each other in the Federal courts. The proceeding here alluded to is one unusual in any court, and is only to be resorted to in the Federal courts, in extraordinary cases, where it is essential to prevent injustice, by an abuse of the process of the court, which cannot otherwise be remedied. But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly.

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is, that the court of chancery cannot render a judgment for



court of the United States, should be finally and conclusively decided. Without such a tribunal it is obvious that there would be no uniformity of judicial decision, and that the supremacy (which is but another name for independence), so carefully provided in the clause of the CONSTITUTION above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

the debt, nor judgment of ejectment, but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts.

"The limitation of the rule must be much stronger, and must be applicable under many more varying circumstances, when persons not parties to the first proceeding are prosecuting their own separate interests in other courts.

"The case before us is an apt illustration of these remarks. The proceeding in the attachment suit did not involve the question of the title of Colbath, defendant in error, to the property attached. The whole proceeding in that court, ending as it might in a judgment for the plaintiff, an execution and sale of the property attached, and satisfaction thereby of the plaintiff's debt, may be, and in such cases usually is, carried through without once requiring the court to consider the question of title to the property. That is all the time a question between the officer, or the purchaser at his sale, on the one side, and the adverse claimant on the other. There is no pretence, nor does any one understand, that anything more is involved or concluded by such proceedings, than such title to the property as the defendant in attachment had when the levy was made.

"Hence it is obvious that plaintiff in error is mistaken when he asserts that the suit in the Federal court drew to it the question of title to the property, and that the suit in the State court against the marshal could not withdraw that issue from the former court. No such issue was before it, or was likely to come before it, in the usual course of proceeding in such a suit.

"It is true, that if under the intimations in *Freeman v. Howe*, the claimant of the property had voluntarily gone before that court and asked by petition that the property be released from the attachment and restored to his possession, he might have raised such issue, and would have been bound by its decision. But no such application was made, no such issue was in fact raised, and no such issue belonged ordinarily to the case. We see nothing therefore in the mere fact that the writ issued from the Federal court, to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it."

See also *Erwin v. Lowry*, 7 How., 172; *Peck v. Jenness*, 7 How., 612; *Harris v. Dennie*, 3 Pet., 292; *Slocum v. Mayberry*, 2 Wheat., 1; *Hagan v. Lucas*, 10 Pet., 400.

“Accordingly it was conferred on the general government in clear, precise, and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the CONSTITUTION and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State or of the United States. And it is manifest that this ultimate appellate power in a tribunal, created by the CONSTITUTION itself, was deemed essential to secure the independence and supremacy of the general government in the sphere of action assigned to it; to make the CONSTITUTION and laws of the United States uniform and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.

“The importance which the framers of the CONSTITUTION attached to such a tribunal, for the purpose of preserving internal tranquility, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court and to abide by its judgment. And it is not out of place to say here that experience has demonstrated that this power was not unwisely surrendered by the States, for in the time that has already elapsed since this government came into existence several irritating and angry controversies have taken place between adjoining States in relation to their respective boundaries, and which have sometimes threatened to

end in force and violence but for the power vested in this court to hear them and decide between them.

“The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States and jurisdiction upon its courts. In the first case it provides that ‘this CONSTITUTION, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land and obligatory upon the judges in every State.’ The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State and the courts of the United States might, and indeed certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

“The CONSTITUTION has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal government, it declares that the jurisdiction of its courts shall extend to all cases arising under this CONSTITUTION and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers or be an assumption of power beyond the grants in the CONSTITUTION.

“This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government. And as the CONSTITUTION is the fundamental and supreme law, if it appears that an act of Con-

gress is not pursuant to, and within the limits of, the power assigned to the Federal government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the CONSTITUTION, nor confined to the interpretation of such laws, but by the very terms of the grant, the CONSTITUTION is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled with the calmness and deliberation of judicial inquiry. And no one can fail to see that if such an arbiter had not been provided in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our governments, State and National, would soon cease to be governments of laws, and revolutions, by force of arms, would take the place of courts of justice and judicial decisions.

“In organizing such a tribunal, it is evident that every precaution was taken which human wisdom could devise to fit it for the high duty with which it was intrusted. It was not left to Congress to create it by law, for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government without any participation on their part. And as the performance of its duty would ‘sometimes come in conflict with individual ambition or interests and powerful political combinations, an act of Congress, establishing such a tribunal, might be repealed in order to establish another, more subservient to the predominating political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers, of which we have spoken, conferred upon it, not by the Federal government, but by the people of the States who formed and adopted that government, and conferred

upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence and enable it, faithfully and firmly, to perform its duty, it engrafted it upon the CONSTITUTION itself, and declared that this court should have appellate power in all cases arising under the CONSTITUTION and laws of the United States. So long, therefore, as this CONSTITUTION shall endure, this tribunal must exist with it, deciding, in the peaceful forms of judicial proceeding, the angry and irritating controversies between sovereignties, which, in other countries, have been determined by the arbitrament of forces.' "

The general rule, as we understand it, deduced from the authorities, is, that the court which *first* obtains jurisdiction has the *exclusive* right to retain it until the cause is disposed of by final judgment or decree; and, within the limits of the powers conferred upon it by law, may decide every question which may arise in it, and may enforce its process, and protect its possession and authority, through all the instrumentalities to which it may lawfully resort.<sup>219</sup> Any other court

<sup>219</sup> *Smith v. McIver*, 9 Wheat., 532; *Mallett v. Dexter*, 1 Curtis, 178; *Parsons v. Lyman*, 5 Blatch., 170; *Reid v. Kerfoot*, Chase, 349; *Crane v. McCoy*, 1 Bond, 422; *Ex Parte Robinson*, 6 McLean, 355; *Ex Parte Forbes*, 1 Dill., 363; *Lansing v. County Treasurer*, 1 Dill., 522; *Levi v. Columbia Life Insurance Company*, 1 Fed. Rep., 206; *Walker v. Flint*, 7 Fed. Rep., 435; *Wallace v. McConnell*, 13 Pet., 136; *Peale v. Phipps*, 14 How., 368; *Harris v. Dennie*, 3 Pet., 292; *Ward v. Todd*, 103 U. S., 327; *Stanton v. Embrey*, 93 U. S., 548; *Ober v. Gallagher*, 93 U. S., 199; *Green v. Creighton*, 23 How., 90; *Dietzsch v. Huidekoper*, 103 U. S., 494; *Williams v. Bruffy*, 102 U. S., 248; *Memphis v. Dean*, 8 Wall., 64.

The doctrine that when a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. *Windsor v. McVeigh*, 93 U. S. 274, citing *Cornett v. Williams*, 20 Wall., 226.

For cases where property was in possession of a receiver, see *Wiswall v. Sampson*, 14 How., 52; *Conkling v. Butler*, 4 Biss., 22; *Buck v. Piedmont and Arlington Insurance Company*, 4 Fed. Rep., 849; *Andrews v. Smith*, 5 Fed. Rep., 833; *Booth v. Clark*, 17 How., 322; *Hamilton v. Chouteau*, 6 Fed. Rep., 339; *Hutchinson v. Green*, 6 Fed. Rep., 833. This last mentioned case was carefully considered, Treat, D. J., and McCrary, C. J., delivering separate opinions, and concurring in the conclusion that a

subsequently assuming to act must, when priority of jurisdiction is properly brought to its notice, proceed no further.<sup>220</sup> When the pendency of a suit in one is relied upon to defeat the jurisdiction of a second suit in another court of concurrent jurisdiction, the parties, or such, at least, as represent the same interest, must be the same; and the relief prayed for, and the essential basis of such relief, must be the same in the different suits.<sup>221</sup>

And, in a case of conflict of jurisdiction, it belongs to the Federal courts to determine their own jurisdiction, the supreme judicial tribunal being the ultimate arbiter.<sup>222</sup>

Priority of jurisdiction of a suit will be determined by priority of service of process;<sup>223</sup> and though, by the laws of a State, a lien upon property accrues from the delivery of the execution to the sheriff, or marshal, and the rights of creditors claiming under the same jurisdiction, are adjudged accordingly; yet the same rule does not apply when a controversy arises between executions issued by a court of the United States and a State court. The officer who acquires possession of the property first, by levy of the execution, obtains a prior right.<sup>224</sup>

court of the United States could not issue an injunction to interfere with the possession, control, or disposition of property in the hands of a State court of co-ordinate jurisdiction; and that when a State court had appointed a receiver of the property of a corporation, and a fraudulent assignment had been subsequently made of the same, a United States court would not enjoin the assignee from receiving such corporate property from the receiver in case the State court having control thereof should order it to be turned over to him. In *United States v. Reindeer*, 2 Cliff., 57, it is held that the possession of a sheriff, under civil process, will not defeat the operation of the revenue laws of the United States.

<sup>220</sup> See cases cited in preceding note.

<sup>221</sup> *Shelby v. Bacon*, 10 How., 56; *Wadleigh v. Veazie*, 3 Sum., 165; *Hubbard v. Bellew*, 3 Fed. Rep., 447.

<sup>222</sup> In addition to the case of *Ableman v. Booth*, 21 How., 506, from which we have already extracted, see *Freeman v. Howe*, 24 How., 450.

<sup>223</sup> *Bell v. Ohio Life and Trust Company*, 1 Biss., 260; *Union Mutual Life Insurance Company v. University of Chicago*, 6 Fed. Rep., 443.

<sup>224</sup> *Taylor v. Carryl*, 20 How., 583.

## SUPREME COURT.

## § 16. Supreme Court—Original Jurisdiction—Parties.—

The original jurisdiction of the Supreme Court, as dependent upon the *character of parties* who may sue or be sued before it, without regard to amount in controversy, is as follows:

AMBASSADORS, AND OTHER PUBLIC MINISTERS, AND THEIR DOMESTICS, AND DOMESTIC SERVANTS.—The CONSTITUTION, as we have already seen, not only in express terms, extends the judicial power to "*all cases affecting ambassadors, and other public ministers,*" but declares that in all such cases "the Supreme Court shall have original jurisdiction."<sup>225</sup> By act of Congress, this jurisdiction is defined to be such "as a court of law can have, consistently with the law of nations;" and in "all suits or proceedings *against* ambassadors, or other public ministers, or their domestics, or domestic servants, the jurisdiction is made *exclusive*." In "all suits brought *by* ambassadors, or other public ministers," the jurisdiction is original, but *not exclusive*."<sup>226</sup>

CONSULS AND VICE-CONSULS.—As in the case of ambassadors, and other public ministers, the judicial power is also extended by the CONSTITUTION, in express terms, to consuls, and the Supreme Court given original jurisdiction of all cases affecting them.<sup>227</sup> By statute, this jurisdiction is declared to be original, but *not exclusive*, of all suits "in which a consul or vice-consul is a party."<sup>228</sup>

STATES.—The judicial power, as before noted, is extended by the CONSTITUTION "to controversies between two or more States, between a State and citizens of another State," and "between a State," and

<sup>225</sup> Constitution, article III., section 2, clauses 1 and 2. See page 51, *ante*. As to what are cases *affecting* ambassadors, etc., see p. 55, *ante*.

<sup>226</sup> Revised Statutes, section 687; see also p. 55, *ante*. United States v. Ravara, 2 Dall., 297.

<sup>227</sup> Constitution, article III., section 2, clauses 1 and 2; see also pp. 55 and 56, *ante*.

<sup>228</sup> Revised Statutes, section 687; see also pp. 55 and 56, *ante*.

"foreign States, citizens or subjects."<sup>229</sup> By amendment to the CONSTITUTION, as also previously noted,<sup>230</sup> the right to commence or prosecute a suit "against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state," is taken away. In all cases "in which a State shall be a party, the Supreme Court is given, by the CONSTITUTION, original jurisdiction."<sup>231</sup> By statute, this jurisdiction is made *exclusive* "of all controversies of a civil nature where a State is a party, except between a State and citizens of other States, or aliens, in which latter cases it shall have original but *not exclusive* jurisdiction."<sup>232</sup>

The original jurisdiction of the Supreme Court, in suits by States against States, has been invoked in a number of cases.<sup>233</sup> While a State may bring a suit originally in the Supreme Court against a citizen of another State, she cannot do so as against one of her own citizens.<sup>234</sup>

**§ 17. Same — Appellate Jurisdiction—Error to State Courts.**—A final judgment, or decree, in any suit in the highest court of a State, in which a decision in the suit could be had, may be re-examined, and reversed, affirmed, or modified by the Supreme Court, upon a writ of error, and without regard to amount in controversy, in the following cases:

1. Where is drawn in question the validity of a *treaty* or *statute* of, or an *authority* exercised under, the *United States*, and the decision of the State court is *against* their validity.<sup>235</sup>

<sup>229</sup> Constitution, article III., section 2, clause 1, p. 2, *ante*.

<sup>230</sup> Eleventh amendment of Constitution, p. 2, *ante*; see also p. 58, *et seq.*, *ante*, and note 55, p. 59, *ante*.

<sup>231</sup> Constitution, article III., section 2, clause 2, p. 58, *ante*.

<sup>232</sup> Revised Statutes, section 687.

<sup>233</sup> See note 24, p. 26, *ante*. As to nature and extent of interest which will give a State a standing in the court in a case of original jurisdiction, see *Florida v. Anderson*, 91 U. S., 667. The jurisdiction cannot be invoked on a political question (*Georgia v. Stanton*, 6 Wall., 50), nor for the purpose of controlling the manner in which improvements shall be made under congressional appropriations. *Wisconsin v. Duluth*, 96 U. S., 379.

<sup>234</sup> *Pennsylvania v. Quicksilver Company*, 10 Wall., 553.

<sup>235</sup> Revised Statutes, section 709. As to when a case may be said to arise under



2. Where is drawn in question the validity of a *statute* of, or *authority* exercised under, any State, on the ground of their being repugnant to the CONSTITUTION, treaties, or laws of the United States, and the decision of the State court is in favor of their validity.<sup>236</sup>

3. Where any *title, right, privilege, or immunity* is claimed under the CONSTITUTION, or any *treaty, or statute, or commission* held, or *authority* exercised under, the United States, and the decision of the State court is against such title, right, privilege, or immunity, specially set up or claimed by either party under such CONSTITUTION, treaty, statute, commission or authority.<sup>237</sup>

the Constitution and laws of the United States, and for the rules by which the Supreme Court of the United States is governed in the exercise of this jurisdiction, see p. 95, *et seq.*, *ante*. The differences between error to *State courts* and to the United States Circuit Courts are pointed out in *Scott v. Sandford*, 19 How., 393. As to what is a *final* judgment or decree, see note 115, p. 96, *ante*. As to *highest court* of record of a State in which decision could be had, see note 116, p. 96, *ante*. As to *authority* exercised under United States, etc., see *Millingar v. Hartup*, 6 Wall., 258; *Buck v. Colbath*, 3 Wall., 334; *Day v. Gallup*, 2 Wall., 97; and cases cited upon this point in note 237, *infra*.

<sup>236</sup> Revised Statutes, section 709. The general principles governing this jurisdiction, and what is a *federal question*, have been stated, p. 95, *et seq.*, *ante*. As to when judgment or decree is *final*, and as to what is *highest court* of record, etc., see notes 115 and 116, p. 96, *ante*. As to what is *law* of State, see *Keith v. Clark*, 97 U. S., 454; *Davis v. Gray*, 16 Wall., 203; *Railroad Company v. McClure*, 10 Wall., 511; *Dodge v. Woolsey*, 18 How., 331; *Williams v. Bruffy*, 96 U. S., 176; *People v. Weaver*, 100 U. S., 539; *The Banks v. The Mayor*, 7 Wall., 16; *Home Insurance Company v. City Council of Augusta*, 93 U. S., 116; *Walker v. Sauvinch*, 92 U. S., 90; *Withers v. Buckley*, 20 How., 84; *Dartmouth College v. Woodward*, 4 Wheat., 518; *Ford v. Surget*, 97 U. S., 594.

<sup>237</sup> Revised Statutes, section 709. For general view of jurisdiction in this class of cases, see pp. 95–101, *ante*. As to *authority* under United States, etc., see *Sharp v. Doyle*, 102 U. S., 686; *Coleman v. Tennessee*, 97 U. S., 509; *Dupasseur v. Roche-reau*, 21 Wall., 130.

As to *right, title*, etc., claimed under Constitution, laws, etc., of United States, see *Romie v. Casanova*, 91 U. S., 379; *Long v. Converse*, 91 U. S., 105; *Smith v. Adsit*, 23 Wall., 368; *Scott v. Kelly*, 22 Wall., 57; *McStay v. Friedman*, 92 U. S., 723; *O'Brien v. Weld*, 92 U. S., 81; *Mathews v. McStea*, 20 Wall., 646; *Railroads v. Richmond*, 15 Wall., 3; *Carpenter v. Williams*, 9 Wall., 785; *Aldrich v. Ætna Company*, 8 Wall., 491; *The Banks v. The Mayor*, 7 Wall., 16; *Reichart v. Felps*, 6 Wall., 160; *Green v. Van Buskirk*, 5 Wall., 307; *Semple v. Hagar*, 4 Wall., 431; *Lanfear v. Hunley*, 4 Wall., 206; *Lewis v. Campau*, 3 Wall., 106; *Verden v. Coleman*, 1 Black, 472; *Magwire v. Tyler*, 1 Black, 195; *Carondelet v. St. Louis*, 1 Black,

**§ 18. Same—Error and Appeals from Supreme Courts of Territories.**—The *final judgments and decrees* of the Supreme Court of any Territory (except Territory of Washington) may be reviewed, and reversed or affirmed, in the Supreme Court, upon *writ of error or appeal*, in the same manner, and under the same regulations, as final judgments and decrees of circuit courts, where the value of the matter in dispute, exclusive of costs—to be ascertained by the oath of either party, or of other competent witnesses—exceeds *one thousand dollars*.<sup>238</sup>

179; Berthold v. McDonald, 22 How., 334; Lytle v. Arkansas, 22 How., 193; Moreland v. Page, 20 How., 522; Wynn v. Morris, 20 How., 3; Burke v. Gaines, 19 How., 388; Bell v. Hearne, 19 How., 252; Shaffer v. Scudday, 19 How., 16; Neilson v. Lagow, 7 How., 772; Clements v. Berry, 11 How., 398; Henderson v. Tennessee, 10 How., 311; Almonester v. Kenton, 9 How., 1; Mills v. St. Clair County, 8 How., 569; Udell v. Davidson, 7 How., 769; Downes v. Scott, 4 How., 500; Maney v. Porter, 4 How., 55; McDonogh v. Millandon, 3 How., 693; Chouteau v. Eckhart, 2 How., 344; Pollard v. Kibbe, 14 Pet., 353; Worcester v. Georgia, 6 Pet., 515; Williams v. Norris, 12 Wheat., 117; Buel v. Van Ness, 8 Wheat., 312; Mathews v. Zane, 7 Wheat., 164; Owings v. Norwood, 5 Cranch, 344.

<sup>238</sup> Revised Statutes, section 702. See Nagle v. Rutledge, 100 U. S., 675; Stringfellow v. Cain, 99 U. S., 610; Cannon v. Pratt, 99 U. S., 619; McAllister v. Kuhn, 96 U. S., 87; Smith v. United States, 94 U. S., 97; Wiggins v. People, 93 U. S., 465; Watts v. Territory of Washington, 91 U. S., 580; Wells v. McGregor, 13 Wall., 188; Sparrow v. Strong, 4 Wall., 584; Brewster v. Wakefield, 22 How., 118; Lowndale v. Parish, 21 How., 290; Stinson v. Donsman, 20 How., 461; Leitensdorfer v. Webb, 20 How., 176; United States v. Ferreira, 13 How., 40; United States v. Carr, 8 How., 1; Parish v. Ellis, 16 Pet., 451; Ward v. Gregory, 7 Pet., 633; Morgan v. Callender, 4 Cranch, 370. In the Territory of Washington the value of the matter in dispute must exceed \$5000, exclusive of costs. Act of February 16, 1875, 18 Statutes at Large, p. 316.

It is provided by the Revised Statutes, section 703: "In all cases where the judgment or decree of any court of a Territory might be reviewed by the Supreme Court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires." Freeborn v. Smith, 2 Wall., 160; Webster v. Reid, 11 How., 437; McNulty v. Battey, 10 How., 72; Hunt v. Palao, 4 How., 589; Revised Statutes, section 1868. To meet the difficulty in appeals from Territorial courts where the laws of the Territory authorize a commingling of common law and chancery jurisdiction, it is provided in section 2 of act of April 7, 1874, (18 Statutes at Large, p. 27; Supplement to Revised Statutes, volume 1, p. 12), "that the appellate jurisdiction of the

**§ 19. Same—Error to Circuit Court without regard to Amount in Controversy.**—In the following cases a *writ of error* will be allowed from the Supreme Court to the circuit courts, to review any *final* judgment at law, without reference to the sum or value in dispute:

1. In cases touching patents rights.<sup>239</sup>
2. In cases touching copyrights.<sup>240</sup>
3. In civil actions brought by the United States for enforcement of any revenue law thereof.<sup>241</sup>
4. In any civil action against any officer of the revenue, for any act done by him in the performance of his official duty.<sup>242</sup>
5. In any civil case against any officer of the revenue, for the recovery of any money exacted by or paid to him, which shall have been paid into the treasury.<sup>243</sup>
6. In any case brought on account of the deprivation of any right, privilege, or immunity, secured by the CONSTITUTION of the United States.<sup>244</sup>
7. In any case brought on account of the deprivation of any right or privilege of a citizen of the United States.<sup>145</sup>
8. In any civil action brought by any person on account of injury to his person or property by any act done in furtherance of any conspiracy mentioned in section 1980, title "CIVIL RIGHTS," Revised Statutes.<sup>246</sup>

Supreme Court of the United States over judgments and decrees of said Territorial courts, in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations, as to form and modes of proceeding, as the said Supreme Court have prescribed or may hereafter prescribe."

<sup>239</sup> Revised Statutes, section 699, sub-division "first."

<sup>240</sup> Revised Statutes, section 699, sub-division "first."

<sup>241</sup> Revised Statutes, section 699, sub-division "second." *Pettigrew v. United States*, 97 U. S., 385; *United States v. Bromley*, 12 How., 88; *United States v. Carr*, 8 How., 1.

<sup>242</sup> Revised Statutes, section 699, sub-division "third." *Mason v. Gamble*, 21 How., 390; *Cary v. Curtis*, 3 How., 236.

<sup>243</sup> Revised Statutes, section 699, sub-division "third."

<sup>244</sup> Revised Statutes, section 699, sub-division "fourth." *Ex Parte Warmouth*, 17 Wall., 64.

<sup>245</sup> Revised Statutes, section 699, sub-division "fourth."

<sup>246</sup> Revised Statutes, section 699, sub-division "fifth."

9. In all cases arising under the provisions of the act of March 1, 1875, chapter 114, section 5, to protect citizens in their civil and legal rights.<sup>247</sup>

**§ 20. Same—Appeals from Circuit Court without regard to Amount in Controversy.**—An *appeal* will lie from the circuit

<sup>247</sup> The following is the text in full of the act referred to:

*An act to protect all citizens in their civil and legal rights.*

WHEREAS, It is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law; therefore,

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year; *provided*, that all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State; *and provided further*, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required

to the Supreme Court from *final* decrees in equity, without reference to the sum or value in dispute, in the following cases:

1. In cases touching patents rights.<sup>248</sup>
2. In cases touching copyrights.<sup>249</sup>
3. In any case brought on account of the deprivation of any right, privilege, or immunity, secured by the CONSTITUTION of the United States.<sup>250</sup>

to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States, or territorial court, as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases; *provided*, that nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars; *and provided further*, that a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

SEC. 4. That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

Approved March 1, 1875.

18 Statutes at Large, p. 335; Supplement to Revised Statutes, volume 1, p. 148.

<sup>248</sup> Revised Statutes, section 699, sub-division "first." *Phillip v. Nock*, 13 Wall., 185; *Brown v. Shannon*, 20 How., 55; *Wilson v. Sandford*, 10 How., 99; *Barnard v. Gibson*, 7 How., 650; *Hogg v. Emmerson*, 6 How., 437.

<sup>249</sup> Revised Statutes, section 699, sub-division "first." *Phillip v. Nock*, 13 Wall., 185.

<sup>250</sup> Revised Statutes, section 699, sub-division "fourth." *Ex Parte Warmouth*, 17 Wall., 64.

4. In any case brought on account of the deprivation of any right or privilege of a citizen of the United States.<sup>251</sup>

**§ 21. Same—Error to Circuit Court, as governed by Amount in Controversy.**—In the following cases a *writ of error* will be allowed from the Supreme to the circuit courts, to review any final judgment at law where the matter in dispute, exclusive of costs, exceeds the sum or value of *five thousand dollars*:<sup>252</sup>

1. In civil actions brought in the circuit courts by original process.<sup>253</sup>

<sup>251</sup> Revised Statutes, section 699, sub-division "fourth."

<sup>252</sup> Revised Statutes, section 691, as amended by act of February 16, 1875, 18 Statutes at Large, p. 315. The third section of this act reads: "That whenever, by the laws now in force, it is required that the matter in dispute shall exceed the sum or value of two thousand dollars, exclusive of costs, in order that the judgments and decrees of the circuit courts of the United States may be re-examined in the Supreme Court, such judgments and decrees hereafter rendered shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs." Supplement to Revised Statutes, volume 1, p. 135.

For cases in which the judgment was held not to be final, see *Baker v. White*, 92 U. S., 176; *New Orleans Railroad v. Morgan*, 10 Wall., 256; *Tracy v. Holcombe*, 24 How., 426; *Boyle v. Zacharie*, 6 Pet., 648; *Smith v. Trabue*, 9 Pet., 4; *Toland v. Sprague*, 12 Pet., 300; *Holcombe v. McKusick*, 20 How., 552; *Miners' Bank v. United States*, 5 How., 213; *Mayberry v. Thompson*, 5 How., 121; *Amis v. Smith*, 16 Pet., 303; *Levy v. Fitzpatrick*, 15 Pet., 167; *Evans v. Gee*, 14 Pet., 1.

As to rules by which court is governed in determining value of matter in dispute, see p. 114, *ante*. See, in addition thereto, *Pierce v. Wade*, 100 U. S., 444; *Tintman v. National Bank*, 100 U. S., 6; *Gray v. Blanchard*, 97 U. S., 564; *Thompson v. Butler*, 95 U. S., 694; *Western Union Telegraph Company v. Rogers*, 93 U. S., 565; *Paving Company v. Mulford*, 100 U. S., 147; *Schacker v. Hartford Fire Insurance Company*, 93 U. S., 241; *Yznaga del Valle v. Harrison*, 93 U. S., 233; *Parker v. Latey*, 12 Wall., 390; *Walker v. United States*, 4 Wall., 163; *Sparrow v. Strong*, 3 Wall., 97; *Cooke v. United States*, 2 Wall., 218; *Lee v. Watson*, 1 Wall., 337; *Ryan v. Bindley*, 1 Wall., 66; *Richmond v. Milwaukee*, 21 How., 391; *Curtis v. Petitpain*, 18 How., 109; *Conner v. Peugh*, 18 How., 394; *Sizer v. Maney*, 16 How., 98; *Bennett v. Butterworth*, 8 How., 124; *Barry v. Mercien*, 5 How., 103; *Hogan v. Foison*, 10 Pet., 160; *Ex Parte Bradstreet*, 7 Pet., 634; *Smith v. Honey*, 3 Pet., 469; *Gordon v. Ogden*, 3 Pet., 33; *Grant v. McKee*, 1 Pet., 248; *Pratt v. Law*, 9 Cranch, 457; *Rush v. Parker*, 5 Cranch, 287; *Cooke v. Woodrow*, 5 Cranch, 13; *United States v. McDowell*, 4 Cranch, 316; *Course v. Stead*, 4 Dall., 22; *Williamson v. Kincaid*, 4 Dall., 20; *Wilson v. Daniel*, 3 Dall., 401.

<sup>253</sup> Revised Statutes, section 691. A judgment in mandamus proceeding is subject to review as any other action. *Hartman v. Greenhow*, 102 U. S., 672; *Colum-*

2. In civil actions removed to the circuit courts from State courts.<sup>254</sup>

3. In civil actions removed from district courts to the circuit courts, by appeal or writ of error.<sup>255</sup>

**§ 22. Same—Appeals from Circuit Court, as governed by Amount in Controversy.**—*Appeals* lie from the circuit to the Supreme Court from final decrees, where the matter in dispute exclusive of costs, exceeds the sum or value of *five thousand dollars*, in the following cases:

1. In cases in equity.<sup>256</sup>

*bian Insurance Company v. Wheelright*, 7 Wheat., 534. Proceeding for contempt in court below not reviewable. *Hays v. Fisher*, 102 U. S., 121.

<sup>254</sup> Revised Statutes, section 691. An order remanding a case to State court is reviewable. *Ayres v. Chicago*, 101 U. S., 184; *Hoodley v. San Francisco*, 94 U. S., 4; *Parker v. Overman*, 18 How., 137.

<sup>255</sup> Revised Statutes, section 691. *The Lucille*, 19 Wall., 73.

<sup>256</sup> Revised Statutes, section 692, as amended by act of February 16, 1875, 18 Statutes at Large, p. 315. See also note 252, *supra*. *Appeal*, and *not writ of error*, is the mode of removing an equity case from the Circuit to the Supreme Court; and, keeping in view the distinction between law and equity, the Supreme Court, in a number of cases, have dismissed writs of error sued out in *equity cases*, and appeals prosecuted in *law cases*. See *Hayes v. Fischar*, 103 U. S., 121; *Marin v. Lalley*, 17 Wall., 14; *Walker v. Dreville*, 12 Wall., 440; *Parson v. Armor*, 3 Pet., 413; *The San Pedro*, 2 Wheat., 132. But see act of April 7, 1874, with respect to Territories, note 238, p. 138, *ante*.

As to what decrees are *final*, or are such as can be appealed from, see *Sage v. Railroad Company*, 96 U. S., 712; *Cambuston v. United States*, 95 U. S., 285; *Hinckley v. G. C. & S. R. R. Co.*, 94 U. S., 467; *Brockett v. Brockett*, 2 How., 238; *Callan v. May*, 2 Black, 541; *McCollum v. Eager*, 2 How., 61; *United States v. Circuit Judges*, 3 Wall., 673; *Marin v. Lalley*, 17 Wall., 14; *Frank v. Shoemaker*, 12 Wall., 86; *Stovall v. Banks*, 10 Wall., 583; *Railroad Company v. Bradleys*, 7 Wall., 575; *Thompson v. Dean*, 7 Wall., 342; *United States v. Billing*, 2 Wall., 444; *M. & M. R. Co. v. Soutter*, 2 Wall., 440; *Bronson v. Railroad Company*, 2 Black, 524; *W. & E. Canal v. Biers*, 1 Black, 54.

As to decrees and orders held to be interlocutory, or such as do not authorize appeal, see *Hentig v. Page*, 102 U. S., 219; *Ex Parte Cutting*, 94 U. S., 14; *Young v. Grundy*, 6 Cranch, 51; *Railroad Company v. Swasey*, 23 Wall., 405; *Thomas & Co. v. Wooldridge*, 23 Wall., 283; *Burrows v. The Marshall*, 15 Wall., 682; *Wheeler v. Harris*, 13 Wall., 51; *Humiston v. Stainthorp*, 2 Wall., 106; *Ogilvie v. Knox Insurance Company*, 2 Black, 539; *Bebe v. Russell*, 19 How., 283; *Farrelly v. Woodfolk*, 19 How., 288; *Craighead v. Wilson*, 18 How., 199; *Barnard v. Gibson*, 7 How., 650; *Pulliam v. Christian*, 6 How., 209; *Perkins v. Fourniquet*, 6 How., 206; *For-*

2. In cases of admiralty and maritime jurisdiction.<sup>257</sup>

**§ 23. Same—Error to District Court without regard to Amount in Controversy.**—A *writ of error* will lie from a final judgment at law in the district to the Supreme Court in all cases arising under the provisions of the act of March 1, 1875, chapter 114, section 5, to protect citizens in their civil and legal rights, without regard to the sum in controversy.<sup>258</sup>

*gay v. Conrad*, 6 How., 201; *DeArmas v. United States*, 6 How., 103; *Young v. Smith*, 15 Pet., 287; *Lea v. Kelley*, 15 Pet., 213; *Brown v. Swan*, 9 Pet., 1; *Chace v. Vasquez*, 11 Wheat., 429.

Questions proper for review, see *Steamer Syracuse*, 12 Wall., 167; *The Maggie Hammond*, 9 Wall., 435; *Morris' Cotton*, 8 Wall., 507; *M. & M. R. R. Co. v. Sontter*, 2 Wall., 510; *Steamer Oregon v. Rocca*, 18 How., 570.

Questions which court declined to review, see *National Bank v. Carpenter*, 101 U. S., 567; *United States v. Ames*, 99 U. S., 35; *The Abbotsford*, 98 U. S. 440; *Buffington v. Harvey*, 95 U. S., 99; *Terry v. Commercial Bank*, 92 U. S., 454; *The Cayuga*, 16 Wall., 177; *Sheets v. Selden*, 7 Wall., 416; *The Vanderbilt*, 6 Wall., 225; *United States v. Estudillo*, 1 Wall., 710; *Malarin v. United States*, 1 Wall., 282; *Dean v. Mason*, 20 How., 198; *McMicken v. Perrin*, 20 How., 133; *Wylie v. Cox*, 14 How., 1; *The Santa Maria*, 10 Wheat., 431.

As to value of matter in dispute and rules by which the court is guided in delivering it, see p. 114, *et seq.*, *ante*.

For cases in which value was held sufficient, see *May v. Sloan*, 101 U. S., 231; *The Rio Grande*, 19 Wall., 178; *Rodd v. Heartt*, 17 Wall., 354; *The Patapsco*, 12 Wall., 451; *Shields v. Thomas*, 17 How., 14; *United States v. Hughes*, 11 How., 552; *Bank of United States v. Daniels*, 12 Pet., 32; *United States v. Eighty-four Boxes of Sugar*, 7 Pet., 453.

For cases in which value was held insufficient, see *Banking Association v. Insurance Company*, 102 U. S., 121; *Terry v. Hatch*, 93 U. S., 44; *Seaver v. Bigelows*, 5 Wall., 208; *Sampson v. Welsh*, 24 How., 207; *Clifton v. Sheldon*, 23 How., 481; *Richmond v. Milwaukee*, 21 How., 80; *Brown v. Shannon*, 20 How., 55; *Rogers v. Steamer St. Charles*, 19 How., 108; *Olney v. Steamship Falcon*, 17 How., 19; *Udall v. Steamship Ohio*, 17 How., 17; *Rich v. Lambert*, 12 How., 347; *Gruner v. United States*, 11 How., 163; *Spear v. Place*, 11 How., 522; *Sewall v. Chamberlaine*, 5 How., 6; *Ross v. Prentiss*, 3 How., 771; *Stratton v. Jarvis*, 8 Pet., 5.

Supreme Court will allow proof to be made in said court in certain actions, as ejectment, etc., of sufficiency of value or amount. *The Grace Girdler*, 6 Wall., 441. *Richmond v. Milwaukee*, 21 How., 391; *Ex Parte Bradstreet*, 7 Pet., 634; *Bush v. Parker*, 5 Cranch, 287.

But *viva voce* testimony will not be permitted. *United States v. Brig Union*, 4 Cranch, 216.

<sup>257</sup> Revised Statutes, section 691, as amended by act of February 16, 1875; 18 Statutes at Large, p. 315.

<sup>258</sup> 18 Statutes at Large, p. 335, sec. 5. This act will be found in full, p. 140, *ante*.



**§ 24. Same—Appeal from District Court, without regard to Amount in Controversy.**—An *appeal* lies to the Supreme Court from all final decrees of any district court in prize causes, without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance.<sup>259</sup>

**§ 25. Same—Appeal from District Court, as governed by Amount in Controversy.**—From all final decrees of the district court in prize causes, an *appeal* may be taken to the Supreme Court, if the matter in dispute, exclusive of costs, exceeds the sum or value of *two thousand dollars*.<sup>260</sup>

**§ 26. Same—Appeal from Court of Claims.**—An appeal lies to the Supreme Court from judgments of the Court of Claims in the following causes:

1. In behalf of the United States from all judgments adverse thereto, without regard to amount in controversy.<sup>261</sup>

2. In behalf of the plaintiff, where the amount in controversy exceeds *three thousand dollars*, or where his claim is forfeited to the United States by the judgment of said court.<sup>262</sup>

**§ 27. Same—Error and Appeal from Supreme Court of District of Columbia.**—The *final judgment* or *decree* of the Supreme Court of the District of Columbia may be re-examined, reversed, or affirmed in the Supreme Court upon *writ of error* or *appeal*, where the matter in dispute, exclusive of costs, exceeds the value of *twenty-five hundred dollars*.<sup>263</sup> And such writ of error or appeal may

<sup>259</sup> Revised Statutes, section 695.

<sup>260</sup> Revised Statutes, section 695. See section 24, *supra*. The *Nuestra Senora de Regla*, 17 Wall., 29; *Withenbury v. United States*, 5 Wall., 819.

<sup>261</sup> Revised Statutes, sections 707–1089. *United States v. Young*, 94 U. S., 258; *Vigo's case Ex Parte United States*, 21 Wall., 648; *United States v. Hickey*, 17 Wall., 9; *United States v. Alire*, 6 Wall., 573; *United States v. Adams*, 6 Wall., 101. See also cases in note 262, *infra*.

<sup>262</sup> Revised Statutes, sections 707–1089. *Young v. United States*, 95 U. S. 641; *Ex Parte Atocha*, 17 Wall., 439; *Ex Parte Roberts*, 15 Wall., 384; *Ex Parte Russell*, 13 Wall., 664; *Ex Parte Zellner*, 9 Wall., 244; *Latham's and Deming's Appeals*, 9 Wall., 145. See also cases in note 261, *supra*.

<sup>263</sup> Revised Statutes, section 705, as amended by act of February 25, 1879 (20

be allowed in any case where the value of the matter in dispute, exclusive of costs, is *less than one thousand dollars but more than one hundred dollars*, upon the petition in writing of either party, accompanied by a copy of the proceedings complained of and an assignment of errors, exhibited to any justice of the Supreme Court, if said justice is of opinion that such errors involve questions of law of such extensive operation as to render a decision of them by the Supreme Court desirable.<sup>264</sup>

§ 28. **Same—Review on Certificate of Division.**—Any *final judgment or decree* in any *civil suit or proceeding* before a circuit court, which was held at the time by a circuit justice and a circuit judge, or by the circuit judge and a district judge, wherein the said judges certify, as provided by law, that their opinions were opposed upon any question which occurred on the trial or hearing of the said suit or proceeding, may be reviewed and affirmed, or reversed, or modified by the Supreme Court on *writ of error or appeal*, according to the nature of the case,<sup>265</sup> and this, it has been held, *without regard to the*

Statutes at Large, 321; Supplement to Revised Statutes, p. 418). Section 4 of this act reads:

"The final judgment or decree of the Supreme Court of the District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court."

See *Market Company v. Hoffman*, 101 U. S., 112; *Paving Company v. Mulford*, 100 U. S., 147; *Railroad Company v. Trock*, 100 U. S., 112; *Railroad Company v. Grant*, 98 U. S., 398; *Stanton v. Embrey*, 93 U. S., 548; *Butterfield v. Usher*, 91 U. S., 246; *Railroad Company v. Church*, 19 Wall., 62; *Smith v. Mason*, 14 Wall., 419; *Garnett v. United States*, 11 Wall., 256; *Pierce v. Cox*, 9 Wall., 786; *Railroad Company v. Bradleys*, 7 Wall., 575; *Thompson v. Riggs*, 5 Wall., 663; *Brown v. Wiley*, 4 Wall., 165; *De Krafft v. Barney*, 2 Black, 704; *United States ex rel. v. Addison*, 22 How., 174; *Van Ness v. Van Ness*, 6 How., 62; *Nixdorff v. Smith*, 16 Pet., 132; *Lee v. Lee*, 8 Pet., 44; *Ritchie v. Mauro*, 2 Pet., 243; *Nicholls v. Hodges*, 1 Pet., 562; *Peyton v. Robertson*, 9 Wheat., 527; *Carter v. Cutting*, 8 Cranch, 251; *Wise v. Columbian Turnpike Company*, 7 Cranch, 276; *Young v. Bank of Alexandria*, 4 Cranch, 384; *United States v. Moore*, 3 Cranch, 159.

<sup>264</sup> Revised Statutes, section 706; *United States v. Ringgold*, 8 Pet., 150.

<sup>265</sup> Revised Statutes, section 693. For cases in which the Supreme Court has considered the points certified, upon which the judges below differed, see *Insur-*

*amount in controversy.*<sup>266</sup> And when any question occurs on the hearing or trial of any *criminal proceeding* before a circuit court, upon which the judges are divided in opinion, and the point upon which they are disagreed is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court.<sup>267</sup>

**§ 29. Supreme Court—Power of to issue Writs of Prohibition, Mandamus, Habeas Corpus, Scire Facias, etc.**—Authority is given to the Supreme Court to issue *writs of prohibition* to the district courts when proceeding as courts of admiralty and maritime jurisdiction.<sup>268</sup>

ance Company v. Dunham, 11 Wall., 1; Brobst v. Brobst, 2 Wall., 96; United States v. City of Chicago, 7 How., 185.

For cases in which the Supreme Court has declined to consider the question certified because of the nature of the question, see Railroad Company v. White, 101 U. S., 98; United States v. Buzzo, 18 Wall., 125; Pelham v. Rose, 9 Wall., 103; Havemeyer v. Iowa County, 3 Wall., 294; Daniels v. Railroad Company, 3 Wall., 250; Silliman v. Hudson River Bridge Company, 1 Black, 582; Wiggins v. Gray, 24 How., 303; United States v. City Bank, 19 How., 385; Ogilvie v. Knox Insurance Company, 18 How., 577; Denuistoun v. Stewart, 18 How., 565; Wilson v. Barnum, 8 How., 258; Sadler v. Hoover, 7 How., 646; Nesmith v. Sheldon, 6 How., 41; White v. Turk, 12 Pet., 238; Packer v. Nixon, 10 Pet., 408; Smith v. Vaughan, 10 Pet., 366; Davis v. Braden, 10 Pet., 286; Grant v. Raymond, 6 Pet., 218; Saunders v. Gould, 4 Pet., 392; Deveraux v. Marr, 12 Wheat., 212.

For cases in which the Supreme Court has declined to consider questions because not properly certified, etc., see Webster v. Cooper, 10 How., 54; Nelson v. Carland, 1 How., 265; Wolf v. Usher, 3 Pet., 269; Perkins v. Hart, 11 Wheat., 237.

The Supreme Court confines itself to the questions of law certified. Ward v. Chamberlain, 2 Black, 430; Adams v. Jones, 12 Pet., 207; White v. Turk, 12 Pet., 238; Ogle v. Lee, 2 Cranch, 53.

<sup>266</sup> Dow v. Johnson, 100 U. S., 158.

<sup>267</sup> Revised Statutes, section 697; United States v. Reese, 92 U. S., 214; United States v. Avery, 13 Wall., 251; United States v. Rosenburgh, 7 Wall., 580; *Ex Parte* Gordon, 1 Black, 503; United States v. Briggs, 5 How., 208; United States v. Stone, 14 Pet., 524; United States v. Bailey, 9 Pet., 267; United States v. Daniel, 6 Wheat., 542; United States v. Plumer, 3 Cliff., 1; United States v. Fullerton, 6 Blatch., 275.

<sup>268</sup> Revised Statutes, section 688; United States v. Judge Peters, 3 Dall., 121. Will not be issued to district court in bankruptcy case; but must be in case of admiralty and maritime jurisdiction. *Ex Parte* Christy, 3 How., 292. See also *Ex Parte* Graham, 10 Wall., 541, where the writ was refused in proceedings to confiscate real estate under act of July 17, 1862. The propriety of issuing the writ will depend on facts stated in the record, and not those stated in the petition for the writ. *Ex Parte* Easton, 95 U. S., 68.

To issue writs of *mandamus* in cases warranted by the principles and usages of law to *any courts appointed under the authority of the United States*, or to *persons holding office under the authority of the United States*, where a *State* or an *ambassador*, or other *public minister*, or a *consul* or *vice-consul*, is a party.<sup>269</sup>

In cases other than those of admiralty and maritime jurisdiction the writ may be issued where *an appeal has been taken*. *Ex Parte Warmouth*, 17 Wall., 64. See also *Bronson v. La Crosse Railroad Company*, 1 Wall., 405; *Ex Parte Gordon*, 1 Black, 503. The writ cannot be used as a remedy for acts already completed. *United States v. Hoffman*, 4 Wall., 158.

<sup>269</sup> Revised Statutes, section 688. As to when Supreme Court will issue *mandamus*, where appellate jurisdiction has attached, see *Ex Parte Railroad Company*, 95 U. S., 221; *Memphis v. Brown*, 94 U. S., 715; *Ex Parte Jordan*, 94 U. S., 248; *Ex Parte Cutting*, 94 U. S., 14; *Railroad Company v. Wiswall*, 23 Wall., 507; *Ex Parte Sawyer*, 21 Wall., 235; *Ex Parte Newman*, 14 Wall., 152; *Ex Parte D. and P. Railroad*, 1 Wall., 69; *United States v. Fossatt*, 21 How., 445; *Mussina v. Cavazos*, 20 How., 280; *Sibbald v. United States*, 12 Pet., 488.

When writ will be issued to control inferior courts, see *Ex Parte Perry*, 102 U. S., 183; *Insurance Company v. Comstock*, 16 Wall., 258; *Ex Parte Russell*, 13 Wall., 664; *Ex Parte Fleming*, 2 Wall., 759; *Ex Parte Ransom v. City of New York*, 20 How., 581; *Stafford v. Union Bank*, 17 How., 275; *Ex Parte Story*, 12 Pet., 339; *United States v. Trigg*, 11 Pet., 173; *Life and Fire Insurance Company v. Adams*, 9 Pet., 573; *Ex Parte Bradstreet*, 8 Pet., 588; *Life and Fire Insurance Company v. Wilson*, 8 Pet., 291; *Ex Parte Bradstreet*, 7 Pet., 634; *Ex Parte Davenport*, 6 Pet., 661; *Ex Parte Crane*, 5 Pet., 190; *Bank of Columbia v. Sweeny*, 1 Pet., 567.

As to when it will be refused as an exercise of original jurisdiction, not warranted by the Constitution, see *Marbury v. Madison*, 1 Cranch, 137; *McCluny v. Silliman*, 2 Wheat., 369.

Cannot be used to coerce State officer to perform duty required by act of Congress. *Kentucky v. Ohio*, 24 How., 66.

The writ does not lie to control judicial discretion. *Ex Parte Railway Company*, 101 U. S., 711; *Ex Parte Loring*, 94 U. S., 418; *Ex Parte Flippin*, 94 U. S., 348; *White v. United States*, 1 Black, 501; *Ex Parte Many*, 14 How., 24; *Ex Parte Taylor*, 14 How., 3; *Ex Parte Roberts*, 6 Pet., 216; *Ex Parte Bradstreet*, 4 Pet., 102; *United States v. Judge Lawrence*, 3 Dall., 42.

Except where judicial discretion has been abused. *Virginia v. Rives*, 100 U. S., 313.

It is not the office of the writ to take the place of error or appeal. *Ex Parte Schwab*, 98 U. S., 240; *Ex Parte Freuch*, 100 U. S., 1; *Commissioner of Patents v. Whiteley*, 4 Wall., 522; *Ex Parte Whitney*, 13 Pet., 404; *Ex Parte Hoyt*, 13 Pet., 279.

When the writ will issue to restore attorneys disbarred: *Ex Parte Robinson*, 19 Wall., 513; *Ex Parte Bradley*, 7 Wall., 365; *Ex Parte Secombe*, 19 How., 9.

For meaning of phrase "usages of law," see *Riggs v. Johnson County*, 6 Wall., 166; *Bank v. Halstead*, 10 Wheat., 51.

Express power is also granted to issue the writ of *habeas corpus*, and the writ of *scire facias*, and all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law,<sup>270</sup> among which may be included *certiorari*, *supersedeas*, *injunction*, etc.

<sup>270</sup> INJUNCTION.—Revised Statutes, section 716. For cases considering the power of the court to issue injunctions, see *Georgia v. Stanton*, 6 Wall., 50; *Mississippi v. Johnson*, 4 Wall., 475; *Cherokee Nation v. Georgia*, 5 Pet., 1; *New York v. Connecticut*, 4 Dall., 1; *Georgia v. Brailsford*, 2 Dall., 402–415.

Authority is given by section 719, Revised Statutes, to any justice of the Supreme Court to grant writs of injunction in cases where they might be granted by the Supreme Court, etc.

The issuance of injunctions from courts of the United States to stay proceedings in State courts, except in matters of bankruptcy, is prohibited, Revised Statutes, section 720; *Dial v. Reynolds*, 96 U. S., 340.

HABEAS CORPUS.—The Revised Statutes, section 751, provide: "The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus." And by the next section (752) it is provided that "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an enquiry into the cause of restraint of liberty." See *Ex Parte Clarke*, 100 U. S., 399; *Ex Parte Siebold*, 100 U. S., 371; *Ex Parte Virginia*, 100 U. S., 339; *Ex Parte Parks*, 93 U. S., 18; *Potts v. Chumaseero*, 92 U. S., 358; *Ex Parte Lange*, 18 Wall., 163; *Ex Parte Yerger*, 8 Wall., 85; *Ex Parte McCardle*, 7 Wall., 506; *Ex Parte McCardle*, 6 Wall., 318; *Ex Parte Milligan*, 4 Wall., 2; *In re Kaine*, 14 How., 103; *Ex Parte Metzger*, 5 How., 176; *Barry v. Merrien*, 5 How., 103; *Ex Parte Dorr*, 3 How., 103; *Ex Parte Barry*, 2 How., 65; *Ex Parte Milburn*, 9 Pet., 704; *Ex Parte Watkins*, 3 Pet., 193; *Ex Parte Kearney*, 7 Wheat., 38; *Ex Parte Wilson*, 6 Cranch, 52; *Ex Parte Bollman*, 4 Cranch, 75; *Ex Parte Burford*, 3 Cranch, 448; *United States v. Hamilton*, 3 Dall., 17.

As to cases in which writ may be issued, etc., see Revised Statutes, section 753, *et seq.*

CERTIORARI.—Revised Statutes, section 716. *Sweeney v. Lomme*, 22 Wall., 208; *The Rio Grande*, 19 Wall., 178; *Hodges v. Vaughn*, 19 Wall., 12; *Stearns v. United States*, 4 Wall., 1; *Ex Parte Dugan*, 2 Wall., 134; *United States v. Gomez*, 1 Wall., 690; *Ex Parte Vallandigham*, 1 Wall., 243; *Clark v. Hackett*, 1 Black, 77; *Morgan v. Curtenius*, 19 How., 8; *Gayler v. Wilder*, 10 How., 509; *Stimpson v. Westchester Railroad Co.*, 3 How., 553; *Holmes v. Trout*, 7 Pet., 171; *Doe ex dem. v. Grymes*, 1 Pet., 469; *Field v. Milton*, 3 Cranch, 514; *Fowler v. Lindsey*, 3 Dall., 411–413.

SUPERSEDEAS.—Revised Statutes, section 716. *Ex Parte Milwaukee Railroad Company*, 5 Wall., 188; *Railroad Company v. Schutte*, 100 U. S., 644; *Goddard v. Ordway*, 94 U. S., 672; *Sage v. Central Railroad Company*, 93 U. S., 412; *Kitchen v. Randolph*, 93 U. S., 86; *Edwards v. Elliott*, 21 Wall., 532; *Commissioners v. Gorman*, 19 Wall., 661; *Telegraph Company v. Eyser*, 19 Wall., 419; *Rodd v. Heartt*,

## CIRCUIT COURT.

§ 30. **Original Jurisdiction—Parties.**—From the establishment of this court in 1789 to act of March 3, 1875,<sup>271</sup> its jurisdiction, as between citizens of different States, could only be maintained *where one of the parties was a citizen of the State in which the suit*

17 Wall., 354; *O'Dowd v. Russell*, 14 Wall., 402; *Slaughter House cases*, 10 Wall., 273; *Railroad Company v. Bradleys*, 7 Wall., 575; *Railroad Company v. Harris*, 7 Wall., 574; *City of Washington v. Denison*, 6 Wall., 495; *Silsby v. Foote*, 20 How., 290; *Hudgins v. Kemp*, 18 How., 530; *Hogan v. Ross*, 11 How., 294; *Hardeman v. Anderson*, 4 How., 640; *Stockton v. Bishop*, 2 How., 74; *Carr v. Hoxie*, 13 Pet., 460; *Wallen v. Williams*, 7 Cranch, 278; *Penhallow v. Doane*, 3 Dall., 54, pp. 87, 105, 106.

<sup>271</sup> 18 Statutes at Large, p. 470; Supplement to Revised Statutes, volume 1, p. 173. In view of the importance of this act, and the fact that it has not yet been incorporated into the text of the Revised Statutes, and must be the subject of very frequent reference, we give its provisions in full:

CHAPTER 137.—An act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant and bills

*was brought.* And the general rule in cases of joint interest was that *each* of the parties must be competent to sue or be sued, that is, *each one of each class* must possess the requisite citizenship, for if any of the defendants were citizens of the same State with the plaintiffs, the jurisdiction was defeated.

of exchange. And the circuit court shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

SEC. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district.

SEC. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court, before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where

Even as to corporations aggregate it was for a long time held that their ability to sue or be sued depended on the citizenship of their several members, so that if all the corporators were not citizens of a different State from that of the party sued, the suit could not be sus-

the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right of title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim; and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury.

SEC. 4. That when any suit shall be removed from a State court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SEC. 5. That if, in any suit commenced in a circuit court, or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

SEC. 6. That the Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

SEC. 7. That in all causes removable under this act, if the term of the circuit



tained. Afterwards the rule was in some measure modified so as to permit the court, where there were several defendants, some of whom were not inhabitants of the district or found therein, and who did not voluntarily appear, to adjudicate as between the parties before it, but

court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court, and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Circuit Court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court.

And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of certiorari to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

SEC. 8. That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such

without prejudice to the rights of the absent parties. Under the old law, an assignee of a promissory note or other chose in action (except foreign bills of exchange), though a citizen of a different State from that of the party sued, could not recover unless a suit might have been prosecuted in such court just as if no assignment had been made. In many and material respects the jurisdiction of this court has of late years been much enlarged, embracing parties and cases of which it could not before take cognizance. Notably is this so of causes which may be removed to it from the State courts. Its com-

absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State; *provided, however,* that any defendant or defendants not actually personally notified as above provided, may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.

SEC. 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved March 3, 1875.

mon law and plenary equity powers, extended to parties and subjects to which its doors were formerly closed, make it at this time a court of great importance, capable of dealing with interests more varied and classes of suitors more numerous than any other court in the Federal judicial system. But we proceed to enumerate the cases over which, on account of the special character of the parties who may sue or be sued before it, it now has, concurrently with the courts of the several States, original jurisdiction. They are:

1. UNITED STATES.—Of suits of a civil nature at common law or equity, where the United States are *plaintiffs* or *petitioners*, and the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars.<sup>272</sup>

2. SAME.—Of suits at common law, where the United States are *plaintiffs*, and sue under authority of act of Congress.<sup>273</sup>

3. OFFICER OF UNITED STATES.—Of suits at common law, where any officer of the United States is *plaintiff*, and sues under authority of act of Congress.<sup>274</sup>

4. CITIZENS OF DIFFERENT STATES.—Of suits of a *civil nature at common law* or in *equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of *five hundred dollars*, and there is a *controversy between citizens of different States*.<sup>275</sup>

5. CITIZENS OF SAME STATE.—Of suits of a *civil nature at common law* or in *equity*, where the matter in dispute exceeds, exclusive of

<sup>272</sup> Section 1 of act of March 3, 1875, p. 150, *ante*; Revised Statutes, section 629, sub-division "second" (see p. 57, *ante*); United States v. Steiner, 8 Blatch., 544; Kohl v. United States, 91 U. S., 367. As to United States being entitled to same remedies as ordinary litigants, see note 50, p. 58, *ante*.

<sup>273</sup> Revised Statutes, section 629, sub-division "third." Kohl v. United States, 91 U. S., 367; Dngan v. United States, 3 Wheat., 172; Postmaster-General v. Early, 12 Wheat., 136; Durose v. United States, 6 Cranch, 307; see also note 50, p. 58, *ante*, and note 272, *supra*.

<sup>274</sup> Revised Statutes, section 629, sub-division "third." See also note 50, p. 58, and note 273, *supra*.

<sup>275</sup> Act of March 3, 1875, section 1, p. 150, *ante*. As to who are citizens, etc., see p. 60, *ante*. As to citizenship of assignees of choses in action, see p. 73, *ante*. As to citizenship of executors, administrators, trustees, etc., see p. 83, *ante*. As to corporations, see p. 90, *ante*. In removal cases, see note 310, *infra*.

costs, the sum or value of five hundred dollars, and the controversy is *between citizens of the same State* claiming lands under *grants of different States*.<sup>276</sup>

6. CITIZENS OF STATE AND FOREIGN STATES.—Of suits of a *civil nature at common law* or in *equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the *controversy is between citizens of a State* and foreign states.<sup>277</sup>

7. CITIZENS OF STATE, AND CITIZENS OR SUBJECTS OF FOREIGN STATES.—Of suits of a *civil nature at common law* or in *equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the controversy is between the *citizens of a State* and the *citizens or subjects of foreign states*.<sup>278</sup>

§ 31. Same—Subject Matter.—With respect to *subject matter* or *character of cause*, the circuit courts are given original jurisdiction concurrent with the courts of the several States, except where it is noted as being exclusive, in the following cases :

1. CONSTITUTION.—Of all suits of a *civil nature*, at *common law* or in *equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *arising under the CONSTITUTION*.<sup>279</sup>

<sup>276</sup> Act of March 3, 1875, section 1, p. 150, *ante*. Colson v. Lewis, 2 Wheat., 377; Town of Pawlett v. Clark, 9 Cranch, 292.

<sup>277</sup> Act of March 3, 1875, section 1, p. 150, *ante*; see also p. 92, *ante*.

<sup>278</sup> Act of March 3, 1875, section 1, p. 150, *ante*; see also p. 92, *ante*.

<sup>279</sup> Act of March 3, 1875, section 1, p. 150, *ante*; Revised Statutes, section 629, sub-division "first."

In the recent case of Hawes v. Contra Costa Water Works Company, 13 Reporter, 161, Mr. Justice Miller, by whom the opinion of the Supreme Court was delivered, referring to the case of Dodge v. Woolsey, 18 How., 331, says: "As the law then stood, there was no means by which the bank, being a citizen of the same State with Dodge, the tax collector, could bring into a court of the United States the right, which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States. That difficulty no longer exists, for by the act of March 3, 1875, all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States, without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank in the case of Dodge v. Woolsey, *supra*, could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its stockholders for that purpose. And this

2. LAWS OF THE UNITED STATES.—Of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *arising under the laws of the United States*.<sup>280</sup>

3. TREATIES.—Of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *arising under treaties made, or which shall be made, under authority of the CONSTITUTION and laws of the United States*.<sup>281</sup>

4. UNITED STATES—PETITIONERS.—Of all suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the *United States are plaintiffs or petitioners*.<sup>282</sup>

same statute, while enlarging the jurisdiction of the circuit courts in cases fairly within the constitutional grant of power to the Federal judiciary, strikes a blow, by its fifth section, at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares, if at any time in the progress of a case, either originally commenced in a circuit court or removed there from a State court, it shall appear to said court 'that such suit does not really involve a dispute or controversy properly within the jurisdiction of said court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed.' It is believed that a rigid enforcement of this statute by the circuit courts would relieve them of many cases which have no proper place on their dockets."

As to when a case may be said to arise under the Constitution of the United States, see pp. 94, 95, 99 and 104; note 150, p. 105; note 237, p. 137, *ante*; and note 307, *infra*.

<sup>280</sup> Section 1 of act of March 3, 1875, p. 150, *ante*. As to when case may be said to arise under laws of United States, see *ante*, pp. 94, 95, 99 and 104; notes 150, p. 105, and 237, p. 137, *ante*, and note 307, *infra*. *Dowell v. Griswold*, 5 Sawy., 39; *Seymour v. Phillips & Colby Co.*, 7 Biss., 460; *Celluloid Manfg. Co. v. Goodyear D. V. Co.*, 13 Blatch., 375; *Hills v. Hompton*, 4 Sawy., 195; *State Lottery Co. v. Fitzpatrick*, 3 Woods's, 222; *Miller v. New York*, 13 Blatch., 469; *Stanley v. Board of Supervisors*, 12 Reporter, 291.

<sup>281</sup> Section 1 of act of March 3, 1875, p. 150, *ante*; see also pp. 102 and 103, *ante*. *Taylor v. Morton*, 2 Curtis, 454; *Baker v. Portland*, 5 Sawy., 566; *Goodfellow v. Muckey*, 1 McCrary, 238; *Myrick v. Thompson*, 99 U.S., 291; *In re Tiburcio Parrot*, 1 Fed. Rep., 481; *Garcia v. Lee*, 12 Pet., 511.

<sup>282</sup> Section 1 of act of March 3, 1875, p. 150, *ante*; Revised Statutes, section 629,

5. UNITED STATES OFFICERS—PLAINTIFFS.—Of all suits at common law where the *United States*, or any officer thereof, suing under the *authority of any act of Congress*, are plaintiffs.<sup>283</sup>

6. IMPORTS—TONNAGE.—Of all suits at law or in equity arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures. This is without regard to amount in controversy.<sup>284</sup>

7. REVENUE LAWS.—Of all causes *arising under any law providing internal revenue*, without regard to amount in controversy.<sup>285</sup>

8. POSTAL LAWS.—Of all causes *arising under the postal laws*, without regard to amount in controversy.<sup>286</sup>

9. CARRIAGE OF PASSENGERS—MERCHANT VESSELS.—Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels, without regard to amount in controversy. This is exclusive of the State courts.<sup>287</sup>

10. PRIZE—CONDEMNATION.—Of all proceedings for the condemnation of property taken as prize in pursuance of section 5308, title

sub-division "second;" see also p. 57, *ante*. *United States v. Stiner*, 8 Blatch., 544; *Cotton v. United States*, 11 How., 229; *United States v. Ames*, 1 Wood & M., 76; *United States v. Boice*, 2 McLean, 352; *United States v. Buford*, 3 Pet., 12; *United States v. Green*, 4 Mason, 427; *United States v. Barker*, 1 Paine, 156; *Dugan v. United States*, 3 Wheat., 172.

<sup>283</sup> Revised Statutes, section 629, sub-division "third," and section 919; see p. 57, *ante*, and note 50, p. 58, *ante*. *Kohl v. United States*, 91 U. S., 367; *Postmaster-General v. Earley*, 12 Wheat., 136; *Duggan v. United States*, 3 Wheat., 172; *United States v. Block*, 3 Biss., 208; *United States v. Barker*, 1 Paine, 156; *Durousseau v. United States*, 6 Cranch., 307; *United States v. Smith*, 1 Hughes, 347,

<sup>284</sup> Revised Statutes, section 629, sub-division "fourth."

<sup>285</sup> Revised Statutes, section 629, sub-division "fourth." *Ex Parte Smith*, 94 U. S., 455; *Crawford v. Johnson*, Deady, 457; see notes 322, 323, *infra*.

<sup>286</sup> Revised Statutes, section 629, sub-division "fourth," and section 919. *Postmaster-General v. Earley*, 12 Wheat., 136; *Dox v. Postmaster-General*, 1 Pet., 318.

<sup>287</sup> Revised Statutes, section 629, sub-division "fifth," and section 4270. *The Candace*, 1 Low., 126.

"Insurrection," Revised Statutes, without regard to amount in controversy. This is exclusive of the State courts.<sup>288</sup>

11. SLAVE TRADE.—Of all suits arising under any law relating to the slave trade.<sup>289</sup>

12. ASSIGNEES OF DEBENTURES FOR DRAWBACK OF DUTIES.—Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any endorser thereof, to recover the amount of such debenture, without regard to amount in controversy.<sup>290</sup>

14. PATENT LAWS.—Of all suits at law or in equity *arising under the patent laws of the United States*, without regard to amount in controversy. This is exclusive of the State courts.<sup>291</sup>

15. COPYRIGHT LAWS.—Of all suits at law or in equity arising under the copyright laws of the United States, without regard to amount in controversy. This is exclusive of the State courts.<sup>292</sup>

<sup>288</sup> Revised Statutes, section 629, sub-division "sixth," and section 5309. *Morris's Cotton*, 8 Wall., 507; *Armstrong's Foundry*, 6 Wall., 766; *Union Insurance Co. v. United States*, 6 Wall., 759; *Confiscation Cases*, 7 Wall., 454; *Mrs. Alexander's Cotton*, 2 Wall., 404; *Fraucis v. United States*, 5 Wall., 338; *Miller v. United States*, 11 Wall., 268; *Tyler v. Defrees*, 11 Wall., 331; *United States v. Shares of Capital Stock*, 5 Blatch., 231; *Titus v. United States*, 20 Wall., 475; *Kirk v. Lewis*, 9 Fed. Rep., 645.

<sup>289</sup> Revised Statutes, section 629, sub-division "seventh."

<sup>290</sup> Revised Statutes, section 629, sub-division "eighth."

<sup>291</sup> Revised Statutes, section 629, sub-division "ninth." *Hartell v. Tilghman*, 99 U. S., 547; *Lilienthal v. Washburn*, 8 Fed. Rep., 707; *Adams v. Meyrose*, 7 Fed. Rep., 208; *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch., 151; *Atwood v. Portland Co.*, 10 Fed. Rep., 283; *Celluloid Manfg. Co. v. Goodyear D. V. Co.*, 13 Blatch., 375; *Allen v. Blunt*, 1 Blatch., 480; *Goodyear v. Day*, 1 Blatch., 565; *Goodyear v. Union India Rubber Co.*, 4 Blatch., 63; *Brooks v. Stolley*, 3 McLean, 523; *Wilson v. Sandford*, 10 How., 99; *Blanchard v. Sprague*, 1 Cliff., 288; *Hill v. Whitcomb*, 1 Holmes, 317; *Pullman v. B. & O. Co.*, 5 Fed. Rep., 72; *Eureka Co. v. Bailey*, 11 Wall., 488; *Perry v. Corning*, 7 Blatch., 195; *Brown v. Shannon*, 20 How., 55; *Littlefield v. Perry*, 21 Wall., 205; *Pearce v. Mulford*, 102 U. S., 112. See also Revised Statutes, sections 4918, 4919, 4920. Under act of February 16, 1875 (18 Stats. at L., p. 315; Supp. to Rev. Stats., vol. 1, p. 135), circuit court sitting in equity may empanel jury and submit to them questions of fact in patent cases.

<sup>292</sup> Revised Statutes, section 629, sub-division "ninth." *Baker v. Selden*, 101 U. S., 99; *Wheaton v. Peters*, 8 Pet., 591; *Stevens v. Cady*, 14 How., 528; *Little v. Hall*, 18 How., 165; *Stevens v. Gladding*, 17 How., 447; *Stevens v. Gladding*, 19

16. **BANKING ASSOCIATIONS.**—Of all suits *by or against any banking association* established in the district for which the court is held, under any law providing for national banking associations, without regard to amount in controversy.<sup>293</sup>

17. **SAME, NATIONAL BANKS.**—Of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "The National Banks," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title.<sup>294</sup>

18. **DAMAGE FOR INJURIES TO PERSON ACTING UNDER REVENUE LAWS.**—Of all suits brought by any person to *recover damages for any injury to his person or property* on account of any act done by him, under any law of the United States for the protection or collection of the revenue thereof.<sup>295</sup>

19. **RIGHT TO VOTE.**—Of all suits brought by any citizen of the United States to enforce his right as such citizen to vote in the several States.<sup>296</sup>

How., 64; *Pulte v. Derby*, 5 McLean, 328; *Pierpont v. Fowle*, 2 Wood & M., 23; *Stevens v. Cady*, 2 Curtis, 200; *Boucicault v. Hart*, 13 Blatch., 47; *Baker v. Taylor*, 2 Blatch., 82; *Boucicault v. Fox*, 5 Blatch., 87; *Paige v. Banks*, 13 Wall., 608; *Myers v. Callaghan*, 5 Fed. Rep., 726; *Johnson v. Donaldson*, 18 Blatch., 287, S. C. (3 Fed. Rep., 22); *Rosenbach v. Dreyfuss*, 2 Fed. Rep., 217; *Ehret v. Pierce*, 18 Blatch., 302; *Clayton v. Stone*, 2 Paine, 392; *Drury v. Ewiug*, 1 Bond, 540.

<sup>293</sup> Revised Statutes, section 629, sub-division "tenth." *Third National Bank of St. Louis v. Harrison*, 8 Fed. Rep., 721; *Bank v. Kenedy*, 17 Wall., 19; *Bank of Betbel v. Pahquioque*, 14 Wall., 383; *National Bank v. Colby*, 21 Wall., 609; *Cadle v. Tracy*, 11 Blatch., 101; *In re Manufacturers' Bank*, 5 Biss., 499; *Manufacturers' National Bank v. Baack*, 2 Abb. U. S., 232; *Main v. Second National Bank*, 6 Biss., 26; *Pattilon v. Noble*, 7 Biss., 449; *Van Antwerp v. Hulburd*, 8 Blatch., 282; *McCracken v. Covington National Bank*, 4 Fed. Rep., 602; *First National Bank of New Orleans v. Bohne*, 8 Fed. Rep., 115; *Commercial Bank of Cleveland v. Simmons*, 1 Flippin, 449; *Orange National Bank v. Traver*, 7 Fed. Rep., 146.

<sup>294</sup> Revised Statutes, section 629, sub-division "eleventh," as amended by act of February 18, 1875 (18 Stats. at L., p. 318; Supp. to Rev. Stats., vol. 1, p. 138). *Harvey v. Lord*, 10 Fed. Rep., 236; *Wright v. Merchants' National Bank*, 1 Flippin, 568; *Van Antwerp v. Hulburd*, 7 Blatch., 426, S. C.; 8 Blatch., 282.

<sup>295</sup> Revised Statutes, section 629, sub-division "twelfth."

<sup>296</sup> Revised Statutes, section 629, sub-division "twelfth." See note 299, p. 161, *infra*.



20. OFFICES.—Of all suits to recover the possession of any office (except that of elector of President, representative or delegate in Congress, or member of the State legislature) authorized by law to be brought, where it appears that the sole question touching the title to such office arises out of the denial of a right to vote, to any citizen offering to vote, on account of race, color, or previous condition of servitude; *provided*, such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the CONSTITUTION of the United States and secured by any law to enforce the right of citizens of the United States to vote in all the States.<sup>297</sup>

21. QUO WARRANTO—FOURTEENTH AMENDMENT.—Of all proceedings by writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office (except as a member of Congress or of a State legislature) contrary to the provisions of the third section of the fourteenth article of amendment of the CONSTITUTION of the United States.<sup>298</sup>

22. PECUNIARY FORFEITURES—RIGHT TO VOTE.—Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several States. This is exclusive of the State courts.<sup>299</sup>

23. DEPRIVATION OF RIGHTS.—Of all suits authorized by law to be brought *by* any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege, or immunity, secured by the CONSTITUTION of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.<sup>300</sup>

<sup>297</sup> Revised Statutes, section 629, sub-division "thirteenth." *Ex Parte Warrmouth*, 17 Wall., 64; *Harrison v. Hadley*, 2 Dill., 229.

<sup>298</sup> Revised Statutes, section 629, sub-division "fourteenth," and section 1786. See note 354, *infra*.

<sup>299</sup> Revised Statutes, section 629, sub-division "fifteenth," and section 2009. *Seely v. Koox*, 2 Woods's, 368; *Cruikshank v. United States*, 92 U. S., 542; *United States v. Reese*, 92 U. S., 214.

<sup>300</sup> Revised Statutes, section 629, sub-division "sixteenth;" see act of March 1,

24. **SAME—CONSPIRACY.**—Of all suits authorized by law to be brought *by* any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985, title "Civil Rights," Revised Statutes.<sup>301</sup>

25. **SAME—PERSONS HAVING KNOWLEDGE OF CONSPIRACY.**—Of all suits authorized by law to be brought *against* any person, who having knowledge that any of the wrongs mentioned in said section 1980 are about to be done, and having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.<sup>302</sup>

26. **OFFICERS AND OWNERS OF VESSELS.**—Of all suits and proceedings arising under section 5344 Revised Statutes, title "Crimes," for the punishment of officers and owners of vessels through whose negligence or misconduct the life of any person is destroyed.<sup>303</sup>

27. **BANKRUPTCY.**—In matters in bankruptcy, to be exercised within the limits and in the manner provided by law.<sup>304</sup>

28. **BONDS OF DEPUTY COLLECTORS.**—Of actions on bonds or other securities given by deputy collectors of internal revenue, concurrently with the district courts and with the courts of the several States.<sup>305</sup>

29. **Cognizance** (exclusive of the State courts) of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and *concurrent*

1875, p. 140, *ante*; Revised Statutes, section 1977, *et seq.* Blyew v. United States, 13 Wall., 581; Slaughter House Cases, 16 Wall., 36; United States v. Crosby, 1 Hughes, 448; Cully v. Baltimore & Ohio R. R. Co., 1 Hughes, 536; Miller v. Mayor of City of New York, 13 Blatch., 469; Illinois v. Chicago & Alton R. R. Co., 6 Biss., 107; *In re Tiburcio Parrott*, 1 Fed. Rep., 481; United States v. Taylor, 3 Fed. Rep., 563.

<sup>301</sup> Revised Statutes, section 629, sub-division "seventeenth." Blyew v. United States, 13 Wall., 581, and other authorities referred to in note 300, *supra*.

<sup>302</sup> Revised Statutes, section 629, sub-division "eighteenth." See note 300, *supra*.

<sup>303</sup> Revised Statutes, section 630, sub-division "nineteenth," and section 5344. Holmes v. Oregon & California Ry. Co., 5 Fed. Rep., 523; *In re Doig*, 4 Fed. Rep., 193.

<sup>304</sup> Revised Statutes, sections 630, 4979. The repeal of the Bankrupt Act took effect September 1, 1878 (20 Stats. at L., p. 99; vol. 1 Supp. to Rev. Stats., p. 335); but cases pending and future proceedings therein were not affected by the repeal.

<sup>305</sup> Section 12 of act of March 1, 1879, 20 Stats. at L., p. 327; vol. 1 Supp. to Rev. Stats., p. 426.

jurisdiction with the district courts of crimes and offenses cognizable therein.<sup>306</sup>

**§ 32. Removal Cases—When either Party may Remove because of Subject-Matter.**—Suits of a *civil nature*, at law or in *equity*, brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of *five hundred dollars*, may be removed by *either party* into the Circuit Court of the United States for the proper district, on account of subject-matter, without regard to citizenship of parties, in the following cases:

1. When the suit arises under the CONSTITUTION of the United States.<sup>307</sup>

2. When the suit arises under the *laws* of the United States.<sup>308</sup>

3. When the suit arises under *treaties* made, or which shall be made, under authority of the United States.<sup>309</sup>

<sup>306</sup> Section 1 of act of March 3, 1875, p. 150, *ante*; Revised Statutes, section 629, sub-division "twentieth," and section 711. Circuit courts have no common law jurisdiction in criminal cases. Congress must first define the offense, affix the punishment, and then confer jurisdiction on some court to try the offender. See review of cases on this subject in note on p. 44, *et seq.*, *ante*.

<sup>307</sup> Section 2 of act of March 3, 1875, p. 151, *ante*. As to when a suit may be said to arise under the Constitution of the United States, see *Gold Washing and Water Co. v. Keyes*, 96 U. S., 199; *Railroad Company v. Mississippi*, 102 U. S., 135; *Babbitt v. Clark*, 103 U. S., 606; *Van Allen v. Atchison, C. & P. R. R. Co.*, 3 Fed. Rep., 545; *Tennessee v. Davis*, 100 U. S., 257; see also note 150, p. 105, *ante*.

As to what is a *suit or case*, generally, see section 7, p. 29, *ante*; *West v. Aurora City*, 6 Wall., 139; *Weston v. City of Charleston*, 2 Pet., 449; *Holmes v. Jennison*, 14 Pet., 540. Does not apply to criminal cases: *Rison v. Cribbs*, 1 Dill., 181; *State v. Grand Trunk R. R. Co.*, 3 Fed. Rep., 887; *Green v. United States*, 9 Wall., 655.

As to amount in controversy, see p. 114, *ante*; *Dillon's Removal*, 2 ed., chap. 13, sec. 51, p. 63; *Lee v. Watson*, 1 Wall., 337; *New York Silk Manfg. Co. v. Second National Bank*, 10 Fed. Rep., 204; *Falls Wire Manfg. Co. v. Broderick*, 6 Fed. Rep., 654; *Keith v. Levi*, 2 Fed. Rep., 743; *Clarkson v. Manson*, 4 Fed. Rep., 257.

<sup>308</sup> Section 2 of act of March 3, 1875, p. 151, *ante*. *Dubuclet v. Louisiana*, 103 U. S., 550; *Frank G. & S. Mining Co. v. Larimer M. & S. Co.*, 8 Fed. Rep., 724; *Houser v. Clayton*, 3 Woods's, 273; *Orner v. Saunders*, 3 Dill., 284; *Connor v. Scott*, 4 Dill., 242; *Pettilon v. Noble*, 7 Biss., 449; *Union Pacific R. R. Co. v. McComb*, 1 Fed. Rep., 799; *Woolridge v. McKenna*, 8 Fed. Rep., 650; *Berger v. Douglas County*, 5 Fed. Rep., 23; see also note 307, *supra*, and note 310, *infra*.

<sup>309</sup> Section 2 of act of March 3, 1875, p. 151, *ante*. See also p. 102, *ante*; *Dillon's Removal*, 2 ed., secs. 30 and 31; and notes 307 and 308, *supra*, and note 310, *infra*.

§ 33: Same—When either Party may Remove because of Special Character of Parties to Suit.—Suits of a *civil nature*, at law or in equity, brought in any State court, where matter in dispute exceeds, exclusive of costs, the sum or value of *five hundred dollars*, may be removed by EITHER PARTY into the Circuit Court of the United States for the proper district, in the following cases:

1. CITIZENS OF DIFFERENT STATES.—Where there is a controversy between citizens of different States.<sup>310</sup>

<sup>310</sup> Act of March 3, 1875, section 2, clause "first," p. 151, *ante*. As to when there is a *controversy between citizens of different States* so as to authorize a removal under the second section of this act, has been the subject of very frequent, and in some respects, of conflicting opinions. To attempt to even cite all the cases would extend this note to too great length; besides, some of the decisions on the circuit, in view of subsequent expositions of the act by the Supreme Court of the United States, are no longer useful as precedents. By turning to the act (p. 151, *ante*), it will be seen this (second) section contemplates, so to speak, *two kinds* of removal: one where there is a *single* controversy; the other where there are *separate* controversies. In both the *controversy* which authorizes the removal must be a *controversy between citizens of different States*, and in both the removal takes the suit—not a part of the suit, but the *entire suit*—from the State to the Federal court. In the former, *i. e.*, where there is a *single* controversy, all the parties to this single controversy on *one side* must be citizens of different States from all the parties on the *other side*; in other words, if any of the parties on the opposite side of the controversy to the plaintiff are citizens of the same State with the plaintiff, the case cannot be removed. And in getting at the controversy, and the parties thereto, the court will disregard the mere forms of pleading, and place parties on opposite sides of the *real matter in dispute*, according to the facts. And in the case of such *single* controversy, all the parties on the side of the controversy seeking a removal must petition therefor.

In the latter, *i. e.*, where there are *separate controversies*, and one of such separate controversies is wholly between citizens of different States, and can be *fully determined* as between such citizens of different States, then *any one*, or more, of the plaintiffs, or of the defendants, actually interested in this separate controversy, may remove the *entire suit* from the State into the Federal court, taking with them all the other controversies and parties thereto. *Corbin v. Van Brunt*, Sup. Ct. U. S., May 8, 1882, 4 Mor. Trans., 818; *Barney v. Latham*, 103 U. S. 205; *Removal Cases*, 100 U. S., 457; *Harter v. Kerochan*, 103 U. S., 562; *Blake v. McKim*, 103 U. S., 336; *Hyde v. Ruple*, Sup. Ct. U. S., October term, 1881, 14 Cen. L. J., 197; *S. C.* 3 Mor. Trans., 516; see also amongst other like cases on the circuit, *Karnes v. A. & O. R. R. Co.*, 10 Fed. Rep., 309; *Presbyterian Society v. Transportation Co.*, 12 Reporter, 105; *Smith v. McKay*, 4 Fed. Rep., 353; *Bailey v. New York Savings Bank*, 18 Blatch., 77; *Clarkson v. Manson*, 18 Blatch., 443; *Iowa Homestead Com-*

2. CITIZENS OF SAME STATE.—Where there is a controversy between citizens of same State claiming lands under *grants of different States*.<sup>311</sup>

3. CITIZENS AND FOREIGN STATES.—Where there is a controversy between citizens of a State and foreign states.<sup>312</sup>

pany v. Des Moines Navigation Co., 8 Fed. Rep. 97; Stevens v. Richardson, 9 Fed. Rep., 191; Buford v. Strother, 10 Fed. Rep., 406; Shumway v. Chicago & Iowa R. R. Co., 4 Fed. Rep., 385; Merchants' National Bank v. Thompson, 4 Fed. Rep., 876; Ruckman v. Palisade Land Co., 1 Fed. Rep., 367; Smith v. Horton, 7 Fed. Rep., 270; Hanover Ins. Co. v. Keogh, 7 Fed. Rep., 764; Greene v. Klinger, 10 Fed. Rep., 689.

As to who are citizens, see p. 60, *et seq.*, *ante*; Dillons' Removal, 2 ed., sec. 53, p. 67. For cases holding that the diversity of citizenship must exist at the *time suit is brought* in State court, see Houser v. Clayton, 3 Woods's, 273; Beede v. Cheuey, 5 Fed. Rep., 388. For cases holding that if the diversity of citizenship exists at the *time the application for removal is made* it is sufficient, see Bruce v. Gibson, 9 Fed. Rep., 540; Jackson v. Insurance Co., 3 Woods's, 413; Curtin v. Decker, 5 Fed. Rep., 385; Phoenix Life Ins. Co. v. Scatlé, 7 Cen. L. J., 398; McLean v. St. Paul & Chicago R. R. Co., 16 Blatch., 309; Johnson v. Monell, 1 Woolw., 390; McGinnity v. White, 3 Dill., 350; see also Barney v. Latham, 103, U. S. 205, where the court say, "The right of removal, if claimed in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed." (Pages 215, 216.)

Right extends to municipal corporations: Cowles v. Mercer County, 7 Wall., 118; Barclay v. Levee Commissioners, 1 Woods's, 254; McCoy v. Washington County, 3 Wall., Jr., 381; note 94, p. 92, *ante*.

As to private corporations: Baltimore & Ohio R. R. Co. v. Koontz, Sup. Ct. U. S., 3 Mor. Trans., 34; Dillon's Removal, 2 ed., sec. 55; Johnson v. Philadelphia, W. & B. R. R. Co., 9 Fed. Rep., 6; Uphoff v. Chicago, St. L. & N. O. R. R. Co., 5 Fed. Rep., 545.

As to joint stock companies: Fargo v. Louisville, N. A. & C. R. R. Co., 6 Fed. Rep., 787.

As to infants, see Woolridge v. McKenna, 8 Fed. Rep., 650.

As to executors, administrators, guardians, trustees, etc., see p. 83, *ante*; Dillon's Removal, 2 ed., p. 68, note 1; Amory v. Amory, 95 U. S., 186.

As to amount in controversy, see note 307, *supra*.

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<sup>311</sup> Section 2 of act of March 3, 1875, p. 151, *ante*. This gives the general right of removal to either party "in which there shall be a controversy between citizens of the same State, claiming lands under grants of different States," and imposes no other conditions than those applicable to other cases of removal, thus superceding, it would seem, the requirements of section 647, Revised Statutes. See Pawlet v. Clark, 9 Cranch, 292; Colson v. Lewis, 2 Wheat, 377.

<sup>312</sup> Section 2 of act of March 3, 1875, p. 151, *ante*.

4. CITIZENS AND FOREIGN CITIZENS.—Where there is a controversy between citizens of a State and the citizens or subjects of foreign states.<sup>313</sup>

5. UNITED STATES.—Where the United States is plaintiff or petitioner in the suit.<sup>314</sup>

As to removal by intervenors, see *In re Iowa and Minnesota Construction Co.*, 10 Fed. Rep., 401; and by warrantors, *Greene v. Clinger*, 10 Fed. Rep., 689.

There must be a controversy; if claim sued on be *admitted* there is none. *Keith v. Levi*, 2 Fed. Rep., 743; *S. C.*, 1 McCrary, 343. But when a suit has been commenced, the presumption will be indulged from this fact that there is a controversy between the parties. *Bailey v. Ins. Co.*, 13 Reporter, 577.

As to what is a "suit," see note 307, p. 163, *ante*.

As to *nature* and *character* of the *suit* and proceeding in which the right of removal may be allowed, see *Barrow v. Hunton*, 99 U. S., 80; *Kern v. Huidekoper*, 103 U. S., 485; *Boom Company v. Patterson*, 98 U. S., 403; *Gaines v. Funtres*, 92 U. S., 10; *Dillon's Removal*, 2 ed., chap. 11, p. 48; *Buford v. Strother*, 10 Fed. Rep., 406; *The Cortes Co. v. Thannhauser*, 9 Fed. Rep., 226; *Clafflin v. Robbins*, 1 Flippin, 603; *Southworth v. Adams*, 4 Fed. Rep., 1; *Mooney v. Agnew*, 4 Fed. Rep., 7.

Disallowed in garnishment proceedings: *Webber v. Humphreys*, 5 Dill., 223; *Pratt v. Allright*, 9 Fed. Rep., 634; *Bank v. Turnbull*, 16 Wall., 190.

In the following cases it was held that the application for removal was not made in the State court in time: *Babbitt v. Clark*, 103 U. S., 606; *Bible Society v. Grove*, 101 U. S., 610; *Forest v. Keeler*, 17 Blatch., 522; *Stough v. Hatch*, 16 Blatch., 233; *Andrews v. Garrett*, 1 Flippin, 445; *Blackwell v. Braun*, 1 Fed. Rep., 351; *Gurnee v. County of Brunswick*, 1 Hughes, 270; *Atlee v. Potter*, 4 Dill., 559; *Murray v. Holden*, 2 Fed. Rep., 740; *Traders' Bank v. Tallmadge*, 9 Fed. Rep., 363; *Meyer v. Norton*, 9 Fed. Rep., 433; *Berrian v. Chetwood*, 9 Fed. Rep., 678; *Kertling v. American Oleograph Co.*, 10 Fed. Rep., 17.

In the following cases it was objected that the application for removal was not made in time and the objection overruled: *Hewitt, Norton & Co. v. Phelps*, 4 Mor. Trans., 455; *Scott v. Clinton & Springfield R. R. Co.*, 6 Biss., 529; *Palmer v. Call*, 4 Dill., 566; *McCullough v. Sterling Furniture Co.*, 4 Dill., 563; *Bailey v.*

<sup>313</sup> Section 2 of act of March 3, 1875, p. 151, *ante*; *Eureka Consolidated Mining Co. v. Richmond Consolidated Mining Co.*, 2 Fed. Rep., 829; *Cooke v. Seligman*, 7 Fed. Rep., 263. If alien subsequently becomes citizen, suit will not be remanded. *Houser v. Clayton*, 3 Woods's, 273; see p. 92, *ante*; *Dillon's Removal*, 2 ed., p. 18, note; *Terry v. Imperial Fire Ins. Co.*, 3 Dill., 408; *Sawyer v. Switzerland Marine Ins. Co.*, 14 Blatch., 451; *Lanz v. Randall*, 4 Dill., 425. No provision is made by law for removal of criminal cases by an alien. *New Hampshire v. Grand Trunk Railway Co.*, 3 Fed. Rep., 887.

<sup>314</sup> Section 2 act of March 3, 1875, p. 151, *ante*; see also p. 57, and note 310, p. 164, *ante*.

6. NON-RESIDENT CITIZEN—PREJUDICE AND LOCAL INFLUENCE.—In a suit between a citizen of the State in which suit is brought and a citizen of another State, the *non-resident citizen*, *i. e.*, the citizen of the State other than that in which suit is brought, whether he be *plaintiff* or *defendant*, may, on affidavit that he has reason to believe, and does believe that, from prejudice or local influence, he will not be able to obtain justice in the State court, remove the cause.<sup>315</sup>

§ 34. Same—When one or more of the Plaintiffs or Defendants may Remove.—Suits of a *civil* nature, at law or in equity, brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of *five hundred dollars*, where there is a controversy which is wholly between *citizens of different States*, and which can be *fully determined as between them*, may be removed by either *one or more of the plaintiffs* or defendants actually interested in such controversy.<sup>316</sup>

American Central Ins. Co., 8 Fed. Rep., 686; Van Allen v. Atchison, C. & P. R. R. Co., 3 Fed. Rep., 545.

Filing petition and bond, as required by law, in the State court, *ipso facto*, removes case from that court. Baltimore & Ohio R. R. Co. v. Koontz, Sup. Ct. U. S., 3 Mor. Trans., 34; Connor v. Scott, 4 Dill., 242; Merchants' Bank v. Wheeler, 13 Blatch., 218; *In re Iowa and Minnesota Construction Co.*, 10 Fed. Rep., 401; New York Silk Manfg. Co. v. Second National Bank of Patterson, 10 Fed. Rep., 204; Dillon's Removal, 2d ed., chap. 17, p. 91.

If the case be removed from a State court where there is no distinction between legal and equitable procedure, it will go to the *law* or *equity* side of the court where appropriate relief can be obtained. Benedict v. Williams, 10 Fed. Rep., 208; Hurt v. Hollingsworth, 100 U. S., 100; Sands v. Smith, 1 Dill., 290; Fisk v. Union Pacific R. R. Co., 8 Blatch., 299; Partridge v. Ins. Co., 15 Wall., 573; La Mothe Manfg. Co. v. National Tube Works, 15 Blatch., 432; Akerly v. Vilas, 3 Biss., 332; Toncey v. Bowen, 1 Biss., 81; Suydam v. Ewing, 2 Blatch., 359; Barclay v. Levee Commissioners, 1 Woods's, 254; Dart v. McKinney, 9 Blatch., 359; Thompson v. Railroad Companies, 6 Wall., 134. See note 28, chap. 1, p. 28, *ante*.

<sup>315</sup> Revised Statutes, sec. 639, sub-division third.

Only the non-resident citizen can remove: Aldrich v. Crouch, 10 Fed. Rep., 305, and cases cited in note; Akerly v. Vilas, 2 Biss., 110; Sands v. Smith, 1 Dill., 290. And adverse party must be citizen of State where suit is brought: Bible Society v. Grove, 101 U. S., 610; Forrest v. Keeler, 17 Blatch., 522.

<sup>316</sup> Barney v. Latham, 103 U. S., 205; Gardner v. Brown, 21 Wall., 36; Yulee v. Vose, 99 U. S., 539; Hervey v. Ill. M. R. R. Co., 7 Biss., 103; Carraher v. Brennan, 7 Biss., 497; and note 310 and authorities there cited, p. 164, *ante*; Chicago v. Gage, 6 Biss., 467.

**§ 35. Same—When Defendants only can Remove.—**

Under the second clause of section 639, Revised Statutes, suits commenced in any State court where the amount in dispute, exclusive of costs, exceeded the sum or value of *five hundred dollars*, could be removed by the *defendant* in the following cases:

(1.) Where the suit was *against an alien* and a citizen of the State where the suit was brought, the *alien* could remove the same;<sup>317</sup> and (2) where the suit was *by the citizen of the State in which the suit was brought, and against a citizen of the same State and a citizen of another State, the non-resident citizen, i. e. the citizen of such other State*, could remove the same. Under said clause the defendant could remove a *part* of the suit if, in so far as it related to him, there could be a final determination of the controversy without the presence of the other defendants as parties to the cause. This left the plaintiff to go on with his suit in the State court as against the other defendants. Such, however, is not now the law; the *whole* and not a part of the suit must be removed.<sup>318</sup>

CORPORATIONS ORGANIZED UNDER LAWS OF UNITED STATES, AND MEMBERS THEREOF.—When the suit is *against any corporation* (other than a banking corporation) organized under any law of the United States, or *against any member* thereof, as such member, for any alleged liability of such corporation, or of such member, as a member thereof, it may be removed upon the petition of such defendant corporation or member, verified by oath, stating that such defendant has a *defense* arising under or by virtue of the CONSTITUTION, or of any *treaty or law* of the United States; provided, the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars.<sup>319</sup>

**§ 36. Same—Civil Rights—Revenue Officers.—***Civil suits or criminal prosecutions*, commenced in any State court, may be re-

<sup>317</sup> The second clause of section 639, Revised Statutes, is in substance the act of July 27, 1866, 14 Stat. at L., p. 306.

<sup>318</sup> Hyde v. Ruble, Sup. Ct. U. S., Jan. 16, 1882, 3 Mor. Trans., 516; see also Barney v. Latham, 103, U. S., 205.

<sup>319</sup> Revised Statutes, section 640. Jones v. Oceanic Steam Navigation Company, 11 Blatch., 406; Gard v. Durant, 4 Cliff., 113; Fisk v. Union Pacific Railroad Com-



moved upon the petition of the *defendant*, stating the facts, verified by oath, etc., in the following cases:

1. **PERSONS DENIED EQUAL CIVIL RIGHTS.**—Where the person sued or prosecuted is denied, or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States.<sup>320</sup>

2. **OFFICER OR OTHER PERSON MAKING ARREST, ETC.**—Where any officer, civil or military, or other person, is sued or prosecuted for any arrest or imprisonment, or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law.<sup>321</sup>

3. **REVENUE OFFICER.**—Where any officer, appointed under or acting by authority of any revenue law of the United States, or any person acting under or by authority of any such officer, is sued or prosecuted on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law.<sup>322</sup>

4. **PERSON HOLDING TITLE UNDER REVENUE OFFICER.**—Where any

pany, 6 Blatch., 362; *Same v. Same*, 8 Blatch., 243; *Magee v. Union Pacific Railroad Company*, 2 Sawy., 447; *Turton v. Union Pacific Railroad Company*, 3 Dill., 366; *Pettilon v. Noble*, 7 Biss., 449; *Bird v. Cockrem*, 2 Woods's, 32; *Kain v. Texas Pacific Railroad Company*, 3 Cent. L. J., 12; *Ely v. Northern Pacific Railroad Company*, 36 Leg. Int., 164; *Farmers' Loan Company v. Maquillan*, 3 Dill., 379; *Patterson v. Boom Company*, 3 Dill., 465; *Lewis v. Smythe*, 2 Woods's, 117; *Texas v. Texas Pacific Railroad Company*, 3 Woods's, 308. In this last mentioned case it was held that the words "any suits" embraced suits brought by a State as well as by one of its citizens; but see *Wisconsin v. Duluth*, 2 Dill., 406, and note 55, p. 59, *ante*.

<sup>320</sup> Revised Statutes, section 641. *Neal v. Delaware*, 103 U. S., 370; *Ex Parte Virginia*, 100 U. S., 339; *State v. Strauder*, 100 U. S., 303; *Virginia v. Rives*, 100 U. S., 313; *In re Wells*, 3 Woods's, 128; *Texas v. Gaines*, 2 Woods's, 342.

<sup>321</sup> Revised Statutes, section 641. *McKee v. Raines*, 10 Wall., 22; *Lamar v. Dana*, 10 Blatch., 34; *Walker v. Crane*, 13 Blatch., 1.

<sup>322</sup> Revised Statutes, section 643. *Venable v. Richards*, Sup. Ct. U. S., May 8, 1882, 4 Mor. Trans., 688; *Tennessee v. Davis*, 100 U. S., 257; *Venable v. Rich-*

person, holding property or estate by title derived from any such revenue officer, is sued or prosecuted, and such suit or prosecution affects the validity of the revenue law under the authority of which such officer acted.<sup>323</sup>

5. OFFICER OR OTHER PERSON—ELECTIVE FRANCHISE.—Where any officer of the United States or other person is sued or prosecuted on account of any act done under the provisions of title xxvi, "THE ELECTIVE FRANCHISE," or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions.<sup>324</sup>

6. CIVIL OFFICER OF UNITED STATES—SUITS BY ALIEN.—Where any citizen of the United States, who is, or was at the time the action accrued, a civil officer of the United States, being a non-resident of the State wherein jurisdiction is obtained in the State court by personal service of process, is sued in any personal action by an alien.<sup>325</sup>

§ 37. Appellate Jurisdiction of Circuit Court—Appeal from District Court in Equity and Admiralty Causes.—An appeal may be taken from the district to the circuit court, from all *final decrees* in causes of equity or of admiralty (except prize causes), where the matter in dispute exceeds the sum or value of *fifty dollars*.<sup>326</sup>

§ 38. Same—Error from Circuit to District Courts.—*Final judgments* of a district court in civil actions, where the matter in dispute exceeds the sum or value of *fifty dollars*, exclusive of

ards, 1 Hughes, 326; Fischer v. Daudistal, 9 Fed. Rep., 145; State v. Port, 3 Fed. Rep., 117; Georgia v. O'Grady, 3 Woods's, 496; Wood v. Mathews, 2 Blatch., 370; Van Zandt v. Maxwell, 2 Blatch., 421; Abranches v. Schell, 4 Blatch., 256; Warner v. Fowler, 4 Blatch., 311; Vietor v. Cisco, 5 Blatch., 128; Dennistoun v. Draper, 5 Blatch., 336; Benchley v. Gilbert, 8 Blatch., 147; Peyton v. Bliss, 1 Woolw., 170; Buttner v. Miller, 1 Woods's, 620.

<sup>323</sup> Revised Statutes, section 643. See note 322, *supra*.

<sup>324</sup> Revised Statutes, section 643. Delaware v. Emerson, 12 Reporter, 769; S. C., 8 Fed. Rep., 411.

<sup>325</sup> Revised Statutes, section 644.

<sup>326</sup> Revised Statutes, section 631; section 1 of act of March 3, 1875, p. 150, *ante*. As to what is final decree from which appeal lies, see United States v. Nourse, 6

costs, may be re-examined, reversed, or affirmed in a circuit court, holden in the same district, upon a writ of error.<sup>327</sup>

**§ 39. Same—Error from Circuit to District Courts in Criminal Cases.**—In all criminal cases tried before the district court, where the sentence is imprisonment, or fine and imprisonment, or where, if fine only, the fine exceeds the sum of three hundred dollars, the defendant, feeling aggrieved by a decision of the district court, may except to the opinion of said court, and tender his bill of exceptions (which shall be settled and allowed according to the truth and signed by the judge, and constitute a part of the record of the case), and carry his case, by writ of error, to the circuit court, in the manner provided in the act of March 3, 1879.<sup>328</sup>

*Pet.*, 470; *Montgomery v. Anderson*, 21 How., 386; *Mordecai v. Lindsay*, 19 How., 199; *The Eddy*, 5 Wall., 481; *Merrill v. Petty*, 16 Wall., 338; *Davis v. The Seneca*, Gilp., 34; *The Merchant*, 4 Blatch., 105; *Westcott v. Bradford*, 4 Wash., 492; *The Hollen*, 1 Mason, 431; *Cushing v. Laird*, 15 Blatch., 219; *The New England*, 3 Sum., 495; *The Enterprise*, 3 Wall., Jr., 53; *The Yuba*, 4 Blatch., 314; *McLellan v. United States*, 1 Gallis, 227.

As to effect of appeal, see *The Lottawana*, 20 Wall., 201; *The Lady Pike*, 96 U. S., 461; *The Wanata*, 95 U. S., 600; *The Collector*, 6 Wheat., 194; *The Lucile*, 19 Wall., 73; *Saratoga v. 438 Bales*, 1 Woods's, 75; *The Roarer*, 1 Blatch., 1; *Harris v. Wheeler*, 8 Blatch., 81; *Deems v. Albany Canal Line*, 14 Blatch., 474; *Rio Grande*, 23 Wall., 458; *United States v. Towns*, 7 Ben., 444.

As to amount or value in dispute, see *The Enterprise*, 2 Curt., 317; *The Roarer*, 1 Blatch., 1; *Taylor v. Woods*, 3 Woods's, 146; *Jenks v. Lewis*, 3 Mason, 503; *McGinnis v. Carlton*, 1 Abb. Ad., 570; *Godfrey v. Gilmartin*, 2 Blatch., 340; *Greigg v. Reade*, Crabbe, 64; *Shirley v. Titus*, 1 Sum., 447; *Davis v. The Seneca*, Gilp., 34; *Agnew v. Dorman*, Taney, 386. See also p. 114, *et seq.*, *ante*.

Case must be carried up by appeal, and not by error. *McLellan v. United States*, 1 Gallis, 227; *United States v. 37 Barrels*, 1 Woods's, 19; *United States v. Haynes*, 2 McLean, 155; *United States v. Wouson*, 1 Gallis., 5.

<sup>327</sup> Revised Statutes, section 633; section 1 of act of March 3, 1875, p. 150, *ante*; *Patterson v. United States*, 2 Wheat., 221; *United States v. Wouson*, 1 Gallis., 5; *United States v. 37 Barrels*, 1 Woods's, 19; *McLellan v. United States*, 1 Gallis., 227; *United States v. Fifteen Hogsheads*, 5 Blatch., 106; *Ex Parte Meador*, 1 Abb. U. S., 317; *Blair v. Allen*, 3 Dill., 101; *United States v. Six Lots*, 1 Woods's, 234; *Jacob v. United States*, 1 Brock., 520; *Westcott v. Bradford*, 4 Wash., 492; *Wheaton v. United States*, 8 Blatch., 474; *Stearns v. Barrett*, 1 Mason, 153; *Smith v. Jackson*, 1 Paine, 453; *Postmaster-General v. Cross*, 4 Wash., 326.

<sup>328</sup> Act of March 3, 1879, 20 Stats. at L., p. 354 (vol. 1, Supp. Rev. Stats., p. 451). *Bates v. United States*, 10 Fed. Rep., 92.

**§ 40. Same—Appeal from Circuit to District Courts in Habeas Corpus Cases.**—From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of *habeas corpus*, or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard, in the following cases:

1. In the case of any person alleged to be restrained of his liberty in violation of the CONSTITUTION or of any law or treaty of the United States.<sup>329</sup>

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.<sup>330</sup>

**§ 41. Authority of Circuit Courts to Issue Certain Writs.**—1. SCIRE FACIAS AND OTHER WRITS.—Authority is conferred by law upon the circuit courts to issue writs of SCIRE FACIAS, and all writs not specifically provided for by statute, which may be necessary to the exercise of their jurisdiction, and agreeable to the usages and principles of law.<sup>331</sup>

<sup>329</sup> Revised Statutes, section 763, paragraph 1. *Seavey v. Seymour*, 3 Cliff., 439. See note 335, p. 174, *infra*.

<sup>330</sup> Revised Statutes, section 763, paragraph 2. See note 329, *supra*, and note 335, p. 174, *infra*.

<sup>331</sup> SCIRE FACIAS.—Revised Statutes, section 716. *Winder v. Caldwell*, 14 How., 434; *Walden v. Craig*, 14 Pet., 147; *Kenosha, etc., R. R. Co. v. Sperry*, 3 Biss., 309; *Mumma v. Potomac Company*, 8 Pet., 281; *Penn v. Klyne*, Pet. C. C., 446; *Wilson v. Watson*, Pet. C. C., 269; *Wilson v. Hurst*, Pet. C. C., 441; *Ex Parte Wood*, 9 Wheat., 603; *Morsell v. Hall*, 13 How., 212; *Hatch v. Eustis*, 1 Gallis., 160; *People, etc., v. Society, etc.*, 1 Paine, 652; *Bentley v. Sevier*, Hemp., 249; *United States v. Thompson*, Gilp., 614; *Brown v. Chesapeake and Ohio Canal Company*, 10 Rep., 649.

CERTIORARI.—Express authority is conferred upon the circuit court to issue this

2. *NE EXEAT*.—Writs of *ne exeat* may be granted where a suit in equity is commenced, and satisfactory proof is made that the defendant desires quickly to depart from the United States.<sup>332</sup>

3. *INJUNCTIONS*.—Writs of injunction are authorized,<sup>333</sup> subject to the inhibition that they shall not be granted to stay proceedings

writ to State courts, commanding them to make return of the record in removal cases. See section 7 of act of March 3, 1875, p. 153, *ante*.

*PROHIBITION*.—United States v. Berry, 4 Fed. Rep., 779; S. C., 2 McCrary, 58; *In re Binninger*, 7 Blatch., 159.

*SEQUESTRATION*.—Steam Stone Cutter Company v. Sears, 9 Fed. Rep., 8.

*SUPERSEDEAS*.—Murray v. Overstoltz, 8 Fed. Rep., 110.

*MANDAMUS*.—In addition to the general authority given by section 716, special authority is conferred upon the circuit courts by section 4 of act of February 22, 1875, 18 Statutes at Large, p. 333 (vol. 1 Supp. to Rev. Stat., p. 145), entitled "An act regulating fees and costs, and for other purposes," to issue writs of mandamus, according to the course of the common law, upon motion of the Attorney-General or the District Attorney of the United States, to any officer thereof to compel him to make the returns and perform the duties required by said act. Express authority is also conferred upon said courts by the act of March 3, 1873, 17 Statutes at Large, p. 509, to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. (Revised Statutes, section 5262.) See on this point *Union Pacific Railroad Company v. Hall*, 91 U. S., 343. Held that the jurisdiction thus conferred is original. *United States v. Union Pacific Railroad Company*, 2 Dill., 527; *Hall v. Union Pacific Railroad Company*, 3 Dill., 515; *United States v. Union Pacific Railroad Company*, 3 Dill., 524.

The general rule is that the circuit court can only grant the writ in aid of *existing jurisdiction*. *Davenport v. County of Dodge*, Sup. Ct. U. S., March 20, 1882, 4 Mor. Trans., 305; *County of Greene v. Daniel*, 102 U. S., 187; *Graham v. Norton*, 15 Wall., 427; *Bath County v. Amy*, 13 Wall., 244; *McIntire v. Wood*, 7 Cranch., 504; *Smith v. Jackson*, 1 Paine, 453; *Osborne v. Board of Commissioners of Adams County*, 7 Fed. Rep., 441. Held in *American Union Telegraph Company v. Bell*

<sup>332</sup> Revised Statutes, section 717; *Lowenstein v. Biernbaum*, 10 Cen. L. J., 233. *Gernon v. Boccaline*, 2 Wash., 130; *Graham v. Stucken*, 4 Blatch., 50.

<sup>333</sup> Revised Statutes, section 719. *Russell v. Farley*, Sup. Ct. U. S., April 3, 1882, 4 Mor. Trans., 410; *Atwood v. Portland Company*, 10 Fed. Rep., 283; *Searles v. J. P. & M. R. R. Co.*, 2 Woods's, 621; *Goodyear Dental Vulcanite Company v. Folsom*, 3 Fed. Rep., 509.

In addition to the general authority conferred by above section, special provision is made where parties feel themselves aggrieved by a warrant of distress (Revised Statutes, section 3637); also for patent cases (Revised Statutes, section 4921), and for national banks against Comptroller of the Currency (Revised Statutes, section 5237.)

in any court of a State, except in relation to proceedings in bankruptcy.<sup>334</sup>

5. HABEAS CORPUS.—Authority is also given to issue writs of *habeas corpus* in the cases, and subject to the limitations, mentioned in section 753, Revised Statutes.<sup>335</sup>

Telephone Company, 1 Fed. Rep., 698, that the jurisdiction is not enlarged by act of March 3, 1875; S. C., 1 McCrary, 175.

As to nature of writ, etc., see *Kentucky v. Dennison*, 24 How., 66; *Kendall v. United States*, 12 Pet., 524; *Kendall v. Stokes*, 3 How., 87; *Ex Parte Rowland*, Sup. Ct. U. S., January 23, 1882, 3 Mor. Trans., 608.

For some of the later cases decided on the circuit, see *Watts v. Lauderdale County*, 13 Rep., 422; S. C., 10 Fed. Rep., 460; *Ætna Insurance Company v. Board of Town Auditors*, 8 Fed. Rep., 473; *Moran v. City of Elizabeth*, 9 Fed. Rep., 72; *United States ex rel. v. Labette County*, 2 McCrary, 25; *United States ex rel. Huidekoper v. Buchanan County*, 5 Dill., 285; *United States ex rel. Merchants' National Bank v. Jefferson County*, 5 Dill., 310; *United States v. Badger*, 6 Biss., 308. See also note 269, p. 148, *ante*.

<sup>334</sup> Revised Statutes, section 720. *Dial v. Reynolds*, 96 U. S., 340; *Hutchinson v. Green*, 6 Fed. Rep., 833; S. C., 2 McCrary, 471; *First National Bank of Youngstown v. Hughes*, 6 Fed. Rep., 737; *Chaffraix v. Board of Liquidation*, 11 Fed. Rep., 638, and note at end of case; *Murray v. Overstoltz*, 8 Fed. Rep., 110; S. C., 1 McCrary, 606.

In addition to the inhibition against staying proceedings in the State courts, section 3224, Revised Statutes, title "Internal Revenue," provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

<sup>335</sup> Revised Statutes, sections 751, 752. Section 753, Revised Statutes, provides: "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." See cases cited in note 270, p. 149, *ante*; see also *Ex Parte Milligan*, 4 Wall., 2; *Barrett v. Hopkins*, 2 McCrary, 129; *Ex Parte Kenyon*, 5 Dill., 385; *United States v. Crook*, 5 Dill., 453; *Ex Parte Reynolds*, 5 Dill., 394; *Ex Parte Houghton*, 8 Fed. Rep., 897; *Ex Parte Waddy Thompson*, 1 Flippin, 507; *Seavey v. Seymour*, 3 Cliff., 439; *United States ex rel. Roberts v. Jailer of Fayette County*, 2 Abb. U. S., 265; *In re Wong Yung Qu*, 6 Sawy., 237; *In re Rudolph*, 6 Sawy., 295; *In re Greathouse*, 4 Sawy., 487; *In re Bird*, 2 Sawy., 33; *In re Bogart*, 2 Sawy., 396; *Ex Parte Shaffenburg*, 4 Dill., 271; *In re Bull*, 4 Dill., 323; *Ex Parte Dock Bridges*, 2 Woods's, 428.

## DISTRICT COURT.

**§ 42. Original Jurisdiction—Parties.**—The district courts, on account of the *special character of parties*, have original jurisdiction in the following cases:

1. UNITED STATES.—Of all suits at common law brought *by the United States*.<sup>336</sup>

2. OFFICER OF UNITED STATES.—Of all suits at common law brought by any officer of the United States authorized by law to sue.<sup>337</sup>

3. BANKING ASSOCIATIONS.—Of all suits *by or against* any association established under any law providing for national banking associations, within the district for which the court is held.<sup>338</sup>

4. ALIENS.—Of all suits brought by any alien for a *tort* only in violation of the law of nations, or of a treaty of the United States.<sup>339</sup>

5. CONSULS AND VICE-CONSULS.—Of all suits against consuls or vice-consuls, except for offenses above the description aforesaid, *i. e.*, in the preceding paragraph.<sup>340</sup>

**§ 43. Same—Subject-Matter.**—Original jurisdiction is given to the district courts with respect to subject-matter or nature of cause, in the following cases:

<sup>336</sup> Revised Statutes, section 563, sub-division "fourth." *Postmaster-General v. Early*, 12 Wheat., 136; *United States v. Boucher*, 6 McLean, 277; *United States v. Stevenson*, 1 Abb. U. S., 495; *United States v. Greene*, 4 Mason, 427; *Jacob v. United States*, 1 Brock., 520. See also authorities cited in note 282, pp. 157 and 158, *ante*.

<sup>337</sup> Revised Statutes, section 563, sub-division "fourth." *Platt v. Beach*, 2 Ben., 303; *Stanton v. Wilkeson*, 8 Ben., 357. See also authorities referred to in note 283, p. 158, *ante*.

<sup>338</sup> Revised Statutes, section 563, sub-division "fifteenth." See note 293, p. 160, *ante*.

<sup>339</sup> Revised Statutes, section 563, sub-division "sixteenth."

<sup>340</sup> Revised Statutes, section 563, sub-division "seventeenth." *Bixby v. Janssen*, 6 Blatch., 315; *Lowry v. Lousada*, 1 Low., 77.

1. **PENALTIES AND FORFEITURES.**—Of all suits for penalties or forfeitures incurred under any law of the United States.<sup>341</sup>

2. **LIEN—INTERNAL REVENUE TAX.**—Of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title or interest.<sup>342</sup>

3. **PENALTIES AND DAMAGES FOR FRAUD.**—Of all suits for the recovery of any forfeiture or damages under section 3490, Revised Statutes, title "DEBTS DUE TO OR BY THE UNITED STATES;" and such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.<sup>343</sup>

4. **POSTAL LAWS.**—Of all causes of action arising under the postal laws of the United States.<sup>344</sup>

5. **ADMIRALTY.**—Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. Such jurisdiction is exclusive, except in the particular cases where jurisdiction is given to the circuit courts.<sup>345</sup>

<sup>341</sup> Revised Statutes, section 563, sub-division "third." *United States v. Mooney*, 11 Fed. Rep., 476; *The Little Ann*, 1 Paine, 40; *United States v. Mann*, 1 Gallis., 3, 177; *Ketland v. The Cassius*, 2 Dall., 365; *Hall v. Warren*, 2 McLean, 332.

<sup>342</sup> Revised Statutes, section 563, sub-division "fifth," and section 3207.

<sup>343</sup> Revised Statutes, section 563, sub-division "sixth," and section 3490.

<sup>344</sup> Revised Statutes, section 563, sub-division "seventh." See note 286, p. 158, *ante*.

<sup>345</sup> Revised Statutes, section 563, sub-division "eighth." As to nature and extent of admiralty jurisdiction, see pp. 105, 106 and 107, *ante*. See also *Steam Navigation Company v. Dyer*, Sup. Ct. U. S., March 20, 1882, 4 Mor. Trans., 277.

As to effect of clause saving to suitors in all cases the right of a common law remedy, etc., see authorities cited in note 152, p. 106, *ante*, and *Leathers v. Blessing*, Sup. Ct. U. S., May 8, 1882, 4 Mor. Trans., 777.

The equitable powers of the admiralty are not co-extensive with those belonging to a court of chancery; there is a wide difference between the two. *Kellum v. Emerson*, 2 Curtis, 79; *Davis v. Child*, 2 Ware, 78; *Andrews v. Essex Insurance Company*, 3 Mason, 6; *The Perseverance*, 1 Bl. and H., 385; *Kynoch v. Ives*, Newb., 205; *The Wm. D. Rice*, 3 Ware, 134; *The Ernest and Alice*, 2 Hughes, 44; *Dean v. Bates*, 2 Wood. & M., 87; *Place v. The Norwich*, 1 Ben., 89.



6. SAME—SEIZURES.—Of all seizures on land and on waters not within admiralty and maritime jurisdiction. This is also exclusive, except in the particular cases where jurisdiction is given to the circuit court.<sup>346</sup>

7. SAME—PRIZES.—Exclusive jurisdiction of all prizes brought into the United States, except as provided in paragraph 6 of section 629, Revised Statutes.<sup>347</sup>

8. PRIZE—INSURRECTION.—Of all proceedings for the condemnation of property taken as prize in pursuance of section 5308, Revised Statutes, title "INSURRECTION."<sup>348</sup>

9. ASSIGNEES OF DEBENTURES FOR DRAWBACK OF DUTIES.—Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any endorser thereof, to recover the amount of such debenture.<sup>349</sup>

10. CIVIL RIGHTS—DAMAGES—CONSPIRACY.—Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his *person* or *property*, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section 1985, Revised Statutes, title "CIVIL RIGHTS."<sup>350</sup>

<sup>346</sup> Revised Statutes, section 563, sub-division "eighth." See note 345, *supra*. See also *United States v. Winchester*, 99 U. S., 372, where it is held that seizures on land do not belong to *admiralty* jurisdiction, but should be proceeded in according to the course of the common law.

<sup>347</sup> Revised Statutes, section 563, sub-division "eighth," as amended by act of February 18, 1875, 18 Statutes at Large, p. 316; vol. 1, Supp. to Rev. Stat., p. 138.

The cases mentioned in paragraph 6 of section 629, which are excepted from the exclusive jurisdiction of the district courts, are proceedings for the condemnation of property taken as prize in pursuance of section 5308, Revised Statutes. See note 288, p. 159, *ante*. With respect to this class of cases the jurisdiction is concurrent with the circuit court.

<sup>348</sup> Revised Statutes, section 563, sub-division "ninth," as amended by act of February 18, 1875, 18 Statutes at Large, p. 316; vol. 1, Supp. to Rev. Stat., p. 138. See authorities referred to in note 288, p. 159, *ante*.

<sup>349</sup> Revised Statutes, section 563, sub-division "tenth," and section 3039.

<sup>350</sup> Revised Statutes, section 563, sub-division "eleventh." *Blyew v. United States*, 13 Wall., 581, and authorities referred to in note 300, pp. 161 and 162, *ante*.

11. SAME—PENALTIES.—Of all actions for the penalty given in section 2 of the act of March 1, 1875, chapter 114, entitled "An act to protect all citizens in their civil and legal rights."<sup>351</sup>

12. DEPRIVATION OF RIGHTS—STATE LAWS.—Of all suits at law or in equity authorized by law to be brought by any person, to redress the deprivation under color of any law, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity secured by the CONSTITUTION of the United States, or of any right secured by any law of the United States, to persons within the jurisdiction thereof.<sup>352</sup>

13. OFFICES.—Of all suits to recover possession of any office (except that of elector of President or Vice-President, representative or delegate in Congress, or member of a State legislature) authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of a right to vote, to any citizen offering to vote, on account of race, color, or previous condition of servitude; *provided*, such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the CONSTITUTION of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the States.<sup>353</sup>

14. QUO WARRANTO—FOURTEENTH AMENDMENT.—Of all proceedings by writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office (except as a member of Congress or of a State legislature) contrary to the provisions of the third section of the fourteenth article of amendment of the CONSTITUTION of the United States.<sup>354</sup>

<sup>351</sup> See act of March 1, 1875, in full, p. 140, and authorities cited in note 300, pp. 161 and 162, *ante*. See also *Lewis v. Hitchcock*, 10 Fed. Rep., 4.

<sup>352</sup> Revised Statutes, section 563, sub-division "twelfth," and sections 1977 and 1979. See also act of March 1, 1875, p. 140, *ante*, and authorities cited in note 300, pp. 161 and 162, *ante*.

<sup>353</sup> Revised Statutes, section 563, sub-division "thirteenth." See note 298, p. 161, *ante*.

<sup>354</sup> Revised Statutes, section 563, sub-division "fourteenth;" also section 1786. The third section of the Fourteenth Amendment of the Constitution is as follows: "No person shall be a Senator or Representative in Congress, or elector of President

15. BONDS OF DEPUTY COLLECTORS.—Of actions on bonds or other securities given by deputy collectors of internal revenue, concurrently with the district courts and with the courts of the several States.<sup>355</sup>

§ 44. **Same—Crimes.**—The district court has original jurisdiction of crimes and offenses in the following cases :

1. PUNISHMENT NOT CAPITAL.—Of all crimes and offenses (except in the cases mentioned in section 5412, Revised Statutes, title "CRIMES") cognizable under the authority of the United States, committed within *their respective districts*, or upon the high seas, the punishment of which is not capital.<sup>356</sup>

2. PIRACY.—Of all cases arising under any act for the punishment of piracy, where no circuit court is held in the district of such court.<sup>357</sup>

3. CIVIL RIGHTS.—Of all crimes and offenses against, and violations of, the provisions of the act of March 1, 1875, chapter 114, entitled "An act to protect all citizens in their civil and legal rights."<sup>358</sup>

§ 45. **Same—Authority of District Court to Issue certain Writs.**—1. SCIRE FACIAS AND OTHER WRITS.—To the district courts power is given by law to issue writs of *scire facias*, and all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.<sup>359</sup>

and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability."

<sup>355</sup> Section 12 of act of March 1, 1879, 20 Statutes at Large, p. 327; vol. 1, Supp. to Rev. Stat., p. 426.

<sup>356</sup> Revised Statutes, section 563, sub-division "first." The cases mentioned in section 5412, Revised Statutes, concern the deposit of fraudulent papers in the Surveyor-General's office in California.

<sup>357</sup> Revised Statutes, section 563, sub-division "fourth."

<sup>358</sup> See section 3 of act of March 1, 1875, p. 140, *ante*.

<sup>359</sup> Revised Statutes, section 716. See section 41, p. 172, *ante*, and notes thereto.

2. **HABEAS CORPUS.**—Authority is also given by statute to the district court to issue writs of *habeas corpus* in the cases and subject to the limitations mentioned in section 753, Revised Statutes.<sup>360</sup>

## COURT OF CLAIMS.

§ 46. **Jurisdiction — Parties — Aliens.**—The jurisdiction of the Court of Claims does not depend, as is the case in many instances with the other courts of the United States, upon the citizenship or residence of the parties; and *aliens*, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, are allowed the privilege of prosecuting claims against the United States, if, by reason of the subject matter and character of such claim, said court can take jurisdiction of them.<sup>361</sup>

§ 47. **Same — Subject Matter.**—The Court of Claims has jurisdiction to hear and determine the following matters:

1. All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, and all claims which may be referred to it by either house of Congress.<sup>362</sup>

2. All set-offs, counter-claims, claims for damages, whether

<sup>360</sup> Revised Statutes, sections 751 and 752, and note 335, p. 174, *ante*.

<sup>361</sup> Revised Statutes, section 1068. For an interesting and valuable sketch of the history, jurisdiction and practice of the Court of Claims, the reader is referred to an article from the pen of the Hon. William A. Richardson, one of the judges of the court, which appeared in No. 6 (February and March, 1882), vol. 7, New Series, Southern Law Review.

From the following authorities a general idea of the extent of the jurisdiction of this court and of the principles governing its exercise may be obtained: *McElrath v. United States*, 102 U. S., 426; *Langford v. United States*, 101 U. S., 341; *Tillson v. United States*, 100 U. S., 43; *United States v. Kaufman*, 96 U. S., 567; *United States v. Gillis*, 95 U. S., 407; *Clark v. United States*, 95 U. S., 539; *United States v. Smith*, 94 U. S., 214; *Intermingled Cotton Cases*, 92 U. S., 651; *Roberts v. United States*, 92 U. S., 41; *Moore v. United States*, 91 U. S., 270; *Ex Parte Atocha*, 17 Wall., 439; *Bonner v. United States*, 9 Wall., 156; *Gibbons v. United States*, 8 Wall., 269.

<sup>362</sup> Revised Statutes, section 1059, sub-division "first."

liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States against any person making claim against the government in said court.<sup>363</sup>

3. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility, on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge and for which such officer was and is held responsible.<sup>364</sup>

4. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, chapter 120, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," or by the act of July 2, 1864, chapter 225, being an act in addition thereto; *provided*, that the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property, in virtue or under color of said acts, from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims; *provided, also*, that the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion.<sup>365</sup>

**§ 48. Same — Petitions and Bills presented to Congress.**—All petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the

<sup>363</sup> Revised Statutes, section 1059, sub-division "second."

<sup>364</sup> Revised Statutes, section 1059, sub-division "third."

<sup>365</sup> Revised Statutes, section 1059, sub-division "fifth," as amended by act of February 18, 1875, 18 Statutes at Large, p. 318; vol. 1, Supp. Rev. Stats., p. 139.

United States, shall, unless otherwise ordered by resolution of the house in which they are introduced, be transmitted by the Secretary of the Senate or by the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims.<sup>366</sup>

**§ 49. Same—Claims against Executive Department.**—Whenever any claim is made against any executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter or claim of the character, amount or class described in this section to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication; *provided*, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.<sup>367</sup>

<sup>366</sup> Revised Statutes, section 1060.

<sup>367</sup> Revised Statutes, section 1063.

## TERRITORIAL COURTS.

§ 50. **Nature of, and Relation to other Courts—Law and Equity.**—It is said in a late case: "All territory within the jurisdiction of the United States, not included in any State, must necessarily be governed by or under the authority of Congress. The Territories are but political sub-divisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the CONSTITUTION."<sup>368</sup>

But the fact that Congress legislates for the Territories, and that the judges of the district and supreme courts of a Territory are appointed, under acts of Congress, by the President of the United States, does not make the courts which they are authorized to hold "courts of the United States." Such courts are but the legislative courts of the Territory, created in virtue of that clause of the CONSTITUTION which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States.<sup>369</sup>

And, though they are invested, for some purposes, with the powers of courts of the United States, and, as we have seen, writs of error and appeals lie from the Supreme Court of the Territory to the

<sup>368</sup> *National Bank v. County of Yorktown*, 101 U. S., 129. See Revised Statutes, section 1864, *et seq.*, for provisions common to all Territories in the organization and jurisdiction of courts.

<sup>369</sup> *Clinton v. Englebrecht*, 13 Wall., 434; *American Insurance Company v. Canter*, 1 Pet., 511; *Benner v. Porter*, 9 How., 235.

Supreme Court of the United States,<sup>370</sup> legislation for the courts of the United States, as organized under the CONSTITUTION, and moving within the sphere of judicial power defined in that instrument, is held not to apply to territorial courts.<sup>371</sup>

It is, no doubt, because of the fact that territorial governments and courts are the mere creatures of Congress, and that the latter are not controlled and restricted in the exercise of judicial functions by the limitations and divisions of judicial power contained in the CONSTITUTION, that Congress has seen fit to enact, "That it shall not be necessary in any of the courts of the several Territories of the United States to exercise separately the common law and chancery jurisdictions vested in said courts, and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases, whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be and the same are hereby validated and confirmed; *provided*, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."<sup>372</sup>

<sup>370</sup> See section 18, p. 138, *ante*.

<sup>371</sup> *Reynolds v. United States*, 98 U. S., 145; *Good v. Martin*, 95 U. S., 90.

<sup>372</sup> Section 1 of act of April 7, 1874, 18 Statutes at Large, p. 27 (vol. 1, Supp. Rev. Stats., p. 12.) We have already noted the provision of section 2 of this act, which regulates the mode of appeal to the Supreme Court of the United States. See note 238, p. 138, *ante*. See also in relation to appeals, *Hecht v. Boughton*, Sup. Ct. U. S., March 20, 1882, 4 Mor. Trans., 301. In this case it is said:

"This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the territorial courts, Congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come on writ of error, and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been, or not, a trial by jury. (*Stringfellow v. Cain*, 99 U. S., 612.) We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the



*Hornbuckle v. Toombs*,<sup>373</sup> a leading case on separating legal and equitable remedies in territorial courts, went up to the Supreme Court of the United States on writ of error to the Supreme Court of the Territory of Montana. From the opinion of the court, delivered by Mr. Justice Bradley, we extract as follows:

court below. The facts set forth in the statement, which must come up with the appeal, are conclusive on us. Under these circumstances the form of proceeding to get a review is not of so much importance as certainty about what is to be done. We cannot agree with counsel for the plaintiff in error that the act of Congress was intended to apply only to those territories where the distinction between suits at law and suits in equity had actually been abolished. From the preamble it may fairly be inferred that the object of the legislation was to prevent embarrassments growing out of the mingling of jurisdictions, but the statute as it stands clearly applies to all territorial courts."

<sup>373</sup> 18 Wall., 648. Afterwards, in *Basey v. Gallagher*, 20 Wall., 670, carried up from the same Territory (Montana), Mr. Justice Field, delivering the opinion of the court, says:

"By the organic act of the Territory, the district courts are invested with chancery and common-law jurisdiction. The two jurisdictions are exercised by the same court, and under the legislation of the Territory. The modes of procedure, up to the trial or hearing, are the same, whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state in ordinary and concise language the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. Sometimes in the same action both legal and equitable relief may be sought, as for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages a jury would be required; but upon the propriety of an injunction, the action of the court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through master's reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact and a special finding made, the court will follow it. But whether it does so or not must

"The only errors assigned are based on the intermingling of legal and equitable remedies in one form of action. Such an objection would be available in the circuit and district courts of the United States. The process act of 1792 expressly declared that in suits in equity, and in those of admiralty and maritime jurisdiction, in those courts, the forms and modes of proceeding should be according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, subject to such alterations and additions as the said courts respectively should deem expedient, or to such regulations as the Supreme Court should think proper to prescribe. The Supreme Court, in prescribing rules of proceeding for those courts, has always followed the general principle indicated by the law. Whether the territorial courts are subject to the same regulation is the question which is now fairly presented.

"In the case of *Orchard v. Hughes*,<sup>374</sup> a majority of this court was of opinion that the territorial courts were subject to the same general regulations in equity cases which govern the practice in the circuit and district courts. That was the case of a foreclosure of a mortgage in the territorial court of Nebraska, and the court, under a territorial law, not only decreed a foreclosure and sale of the mortgaged premises, but gave a personal decree against the defendant for the deficiency. We had decided in *Noonan v. Lee*<sup>375</sup> that under the

depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings of the jury may undoubtedly be qualified by statute, but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion. That statute is substantially a copy of the statute of California as it existed in 1851, and it was frequently held by the Supreme Court of that State that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate the findings was made by the parties, if, in its judgment, they were not supported by the evidence. That court only held that the findings, when not objected to in the court below, and the judge was satisfied with them, could not be questioned for the first time on appeal."

<sup>374</sup> 1 Wall., 73.

<sup>375</sup> 2 Black., 499.

equity rules prescribed for the circuit and district courts, such a decree could not be made. The majority of the court now applied the same rule in the case of *Orchard v. Hughes*, although it was decided by a territorial court. Following out the principle involved in that decision, we subsequently, in the case of *Dunphy v. Kleinsmith*,<sup>376</sup> reversed a judgment of the Supreme Court of Montana, on the ground that the case (being in nature of a creditor's bill, filed to reach property which the debtor had fraudulently conveyed) was a clear case of equity, whilst the proceedings therein exhibited no resemblance to equity proceedings, there being a trial by jury, a verdict for damages, and a judgment on the verdict. On a careful review of the whole subject, we are not satisfied that those decisions are founded on a correct view of the law. By the sixth section of the organic act of the Territory of Montana, with which that of Nebraska substantially agreed, it was enacted 'that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the CONSTITUTION of the United States and the provisions of this act.' By the ninth section it was provided 'that the judicial power of said Territory shall be vested in a Supreme Court, district courts, probate courts, and in justices of the peace,' and that 'the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be limited by law; *provided*, that the said Supreme and district courts respectively shall possess chancery as well as common law jurisdiction.'

"Now, here is nothing which declares, as the process act of 1792 did declare, that the jurisdictions of common law and chancery shall be exercised separately, and by distinct forms and modes of proceedings. The only provision is, that the courts named shall possess both jurisdictions. If the two jurisdictions had never been exercised in any other way than by distinct modes of proceeding, there would be ground for supposing that Congress intended them to be exercised in that way.

"But it is well known that in many States of the Union the two

<sup>376</sup> 11 Wall., 610.

jurisdictions are commingled in one form of action. And there is nothing in the nature of things to prevent such a mode of proceeding. Even in the circuit and district courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side; and the enforced separation of the two remedies, legal and equitable, in reference to the same subject-matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice. In most cases it is difficult to see any good reason why an equitable right should not be enforced or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated. Be this, however, as it may, a consolidation of the two jurisdictions exists in many of the States, and must be considered as having been well known to Congress; and when the latter body, in the organic act, simply declares that certain territorial courts shall possess both jurisdictions, without prescribing how they shall be exercised, the passage by the territorial assembly of a code of practice, which unites them in one form of action, cannot be deemed repugnant to such organic act.

“The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the Federal system, and as invested with the judicial power of the United States, expressly conferred by the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective State courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

“From a review of the entire past legislation of Congress on the

subject under consideration, our conclusion is that the practice, pleadings and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves. Of course, in case of any difficulties arising out of this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper."

From this opinion, Clifford, Davis and Strong, J. J., dissented, upon the ground that the court had several times decided that claims at law and claims in equity could not be united in one action, even in the territorial courts, and that if a change in the rule was to be made, it should be made by Congress.

In *Hurt v. Hollingsworth*,<sup>377</sup> which went up to the Supreme Court of the United States by writ of error to the Circuit Court for the Eastern District of Texas, the case of *Hornbuckle v. Toombs*, from which we have just extracted, was referred to and stated not to be in conflict with the rule which prevents, in the courts of the United States, the blending of legal and equitable causes of action in the same suit. It is there said of *Hornbuckle v. Toombs* that "it only decides that the process act of 1792 does not extend to proceedings in the courts of the several Territories, which may be regulated by their respective legislatures."<sup>378</sup>

Whether Congress can adopt State codes which commingle and unite legal and equitable causes of action in the same suit, admits of very grave doubt. If, by adopting such codes, suitors in the courts of the United States are deprived of the privilege of enforcing legal or equitable rights according to the principles of decision and the

<sup>377</sup> 100 U. S., 100.

<sup>378</sup> See also *Page v. Burnstine*, 102 U. S., 664, p. 668. In this case *Hornbuckle v. Toombs* (18 Wall., 648) is again referred to as showing that general statutes relating to practice in the courts of the United States do not apply to territories.

modes of trial which belong respectively to law and equity, as mentioned and distinguished in the CONSTITUTION, then it would seem clear that it could not be done. If the CONSTITUTION not only recognizes, but, as we maintain, perpetuates the distinction between law and equity, we are at a loss to see how Congress can accomplish, indirectly, by adopting State codes, or by authorizing the Federal courts to make rules, that which it cannot do directly, to-wit: obliterate and render nugatory a distinction established by the CONSTITUTION itself.<sup>379</sup>

<sup>379</sup> See section 4, p. 6, *ante*, where the authorities resting the distinction between law and equity on the Constitution are reviewed. See also section 3, p. 3, *ante*, as to why the words "law and equity" and "common law and equity" were inserted in the Constitution. Unless State codes were uniform in their recognition of primary equitable rights and made full provision for remedial equitable rights, their adoption for the courts of the United States would practically destroy the equity jurisdiction conferred by the Constitution on these tribunals. There would not only be no uniformity in practice, but there would, in many cases, be an absolute denial of all equitable relief. Even with respect to the Territorial Court of Montana, in *Basey v. Gallagher* (see note 373, p. 185, *ante*), the court is careful to say: "The formal distinctions in the pleadings and modes of procedure are abolished, but the *essential distinction between law and equity* is not changed. The relief which the *law* affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which *equity* affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through master's reports or findings of a jury, is merely advisory." By the seventh amendment of the Constitution (see section 2, p. 2, *ante*) the right of trial by jury, as we have seen, is inviolably preserved in all suits at *common law* where the value in controversy shall exceed twenty dollars, etc. This of itself, as to the mode of trial, forces an observance of the essential distinction between suits at *common law* and *suits in equity*, for, in the former, the party is entitled to the verdict of a jury; in the latter, to the judgment of the chancellor; in other words, he is entitled, on the one hand, to the remedial rights which belong to courts of law, and on the other, to the remedial rights and agencies peculiar to courts of equity, and it is not believed that he can, in any material respect, be rightfully and effectually deprived of either without a change in the Constitution.

## CHAPTER III.

### OF THE SOURCE AND RULE OF DECISION OF LEGAL AND EQUITABLE RIGHTS.

§ 51. Preliminary Observations—Importance of Considering the Source of Rights.—Having shown that the distinction between law and equity is not only recognized and perpetuated in the CONSTITUTION, and expressly mentioned and preserved in various acts of Congress, but that the courts of the United States, from their earliest organization down to the present time, have applied and enforced this distinction, and having considered the nature and general principles of Federal jurisdiction, and enumerated the cases over which, under the CONSTITUTION and laws of the United States, the several courts thereof may take cognizance, we come now to speak of the source of legal and equitable rights, as preliminary to a discussion of the rule which confines legal rights, titles, claims and defenses to the law side, and equitable rights, titles, claims and defenses to the equity side of the court. The importance of keeping in view the source of a right is obvious, for the law which gives birth to a right, and in which it lives, moves and has its being, often so inheres in and constitutes a part of the right itself as of necessity to control or give shape and form to the remedies employed for its conservation or enforcement. Hence it is that, by looking to the origin of a right, we are able the more readily to detect its legal or equitable characteristics, and assign it to that side of the court to which it may properly belong. Not that all rights which we may notice are readily susceptible of this technical classification, for in some instances, as we shall see, the courts of the United States are called upon to deal with

rights originating under laws where this distinction is unknown, and in others with rights the creatures of legislative enactment, so novel in their character that it is difficult, by way of contradistinction, to designate them as either legal or equitable. Nor, as we shall see, is it true that in all cases and under all circumstances, legal rights, titles, claims and defenses can only be asserted on the law side, and equitable rights, titles, claims and defenses can only be asserted on the equity side of the court. Such a position would not only at once destroy all concurrent jurisdiction between courts of law and courts of equity, but would prevent the legislature from making such changes in the mode of enforcing rights, both at law and equity, as might, without any essential impairment of the distinction between the two systems, be necessary to meet the requirements of judicial convenience.

And here we may observe that in speaking of rights, we mean such only as are susceptible of judicial cognizance and enforcement, and shall for the most part refer to property rights, as those to which the distinction between legal and equitable most generally applies. Not that the rights of persons are to be overlooked, for their importance and the intimate relation they sustain in many instances to rights of property, render some consideration of them also necessary.

Without attempting to trace them in all their ramifications, it will be sufficient for our present purpose to briefly consider the extent to which the rights of person and property are derived from, and are to be determined by, (1) the common and statute law of England before the independence of the Colonies, (2) the laws of the Colonial Congress and legislatures of the several States before their independence or erection into States, (3) the laws of former governments prevailing over territory ceded to or acquired by the United States, (4) the constitutions of the several States, (5) the laws of the legislatures of the several States, (6) the CONSTITUTION of the United States, (7) the treaties of the United States, (8) the laws of the Congress of the United States, and (9) the law of nations.



**§ 52. No National Common Law.**—We have already remarked that of the United States, as a nation, or in their united capacity, there is, strictly speaking, no common law. That is to say, independent of the authority of the CONSTITUTION and laws of the United States and the Constitutions and laws of the several States, there is no principle pervading the entire Union, from which rights emanate.<sup>1</sup>

In the Federal courts, the common law of England, as conferring jurisdiction, is operative to the extent only that it may be expressly adopted by Congress, and, as a source of rights, it has no binding force save in the particulars and in so far only as it may be sanctioned by the CONSTITUTION and laws of the United States and the Constitutions and laws of the several States.<sup>2</sup> And, generally, where a common-law right is asserted, we look to the law of the particular State in which the controversy respecting it arises, to see if it is there recognized, and to what extent, if any, it has been modified.<sup>3</sup>

**§ 53. Common and Statute Law of England before the Independence of the Colonies.**—Before the independence of the Colonies, the common law of England, brought with them by our colonial ancestors on their migration to this country, constituted, in so far as the same was applicable to their condition, the main body of the law by which their rights of person and of property were determined. Not only is this true of those principles, rules and usages which are said not to rest for their authority upon any express and positive declaration of legislative will, but such of the English statutes as were passed in amendment and modification of the common law prior to colonization, as well as such as were afterwards practically accepted and adopted up to the time of the Revolution, are to be deemed and considered as a part of the common law in force in the Colonies before their independence.<sup>4</sup>

<sup>1</sup> See note 9, p. 42, *ante*.

<sup>2</sup> See note 9, p. 42, *ante*. Cooley's Const. Lim. (4 ed.), pp. 26 and 27.

<sup>3</sup> See note 9, p. 42, *ante*. Cooley's Const. Lim. (4 ed.), p. 31.

<sup>4</sup> *Patterson v. Winn*, 5 Pet., 233; *Cathcart v. Robinson*, 5 Pet., 264; *United*

Both in the royal charters, under which colonial settlements were made and colonial governments established, and in colonial statutes, do we find the common law expressly mentioned and sanctioned."

And in 1774 it was unanimously declared by the Colonial Congress, "That the inhabitants of the English colonies in North America, by the immutable law of nations, the principles of the English Constitution, and the several charters and compacts, are entitled to the common law of England, and to the benefit of such of the English statutes as existed at the time of their colonization, and which they have, by their experience, respectively found to be applicable to their several local and other circumstances. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charter or secured by their several codes of provincial law."<sup>5</sup>

**§ 54. Laws of the Colonial Congresses and Legislatures of the several States before their Independence or Erection into States.**—The Colonies all derived their powers from the Crown, and, before the Revolution, acknowledged their allegiance to the government of Great Britain. As between them, however, no political connection existed. Each was independent of the other, possessing a domestic government peculiar to itself. Each, as a body politic and corporate, exercised, within a sphere more or less enlarged, legislative, executive and judicial functions. Laws affecting the rights of persons and property were passed by the local congresses and legislatures of each. These laws, together with the common and statute law of England previously of force in the colonies, were, when they adopted their State Constitutions, generally retained, except in so far as they were repugnant to their new form of government. When, therefore, questions arise touching rights which accrued between the first establishment of the Colonies and their erection into independent

States v. Shepard, 1 Abb. U. S., 431; Cooley's Const. Lim. (4 ed.), p. 31, *et seq*; 1 Kent's Com., Lect. 16, 343; 1 Cooley's Blacks., p. 67, note 3; Story's Const., section 158.

<sup>5</sup> Declaration of Rights of October 14, 1774, Journals of Congress, vol. 1, p. 28; 1 Kent's Com., Lect. 16, 343; 1 Story's Const., section 104.

States, we recur, keeping in mind the qualification just mentioned for our guidance, to the common and statute law of England and the laws of the Colonial congresses and legislatures.<sup>6</sup>

**§ 55. Laws of former Governments Prevailing over Territory Ceded to or Acquired by the United States.—**

From what has been said, it will be understood, that when the Federal CONSTITUTION was formed, the common law was the basis of the jurisprudence of all the States, and probably no States were contemplated in which it would not exist.<sup>7</sup> But the acquisition of new territory and the addition to the Union of new States, over which the laws of France, Spain and Mexico once prevailed, made it necessary, in adjudging rights accruing therein, to look to the laws of these former governments, and to have recourse, in some cases, to the civil, instead of the common law, as the foundation of their judicial systems. Especially is this true in matters affecting land titles, as in Louisiana, Florida, Texas, California and Missouri.<sup>8</sup> In the absence of treaty stipulations specially providing therefor, where a change of sovereignty has taken place, the titles to the private property of the inhabitants of the ceded territory remain as valid under the new government as under the old.<sup>9</sup> And where countries have been acquired by the

<sup>6</sup> Cooley's Const. Lim. (4 ed.), p. 33, *et seq*; 1 Kent's Com., Lect. 21, 473; 1 Story's Const., 18.

<sup>7</sup> Parsons v. Bedford, 3 Pet., 433; see note 4, p. 3, *ante*.

<sup>8</sup> The following, from a very large number of cases, will illustrate the statement in the text and show the extent to which the laws of former governments are relied upon for the purpose of settling rights: Adam v. Norris, 103 U. S., 591; Hunnicutt v. Peyton, 102 U. S., 333; Phillips v. Moore, 100 U. S., 208; Brownsville v. Cavazos, 100 U. S., 138; Palmer v. Low, 98 U. S., 1; United States v. Perot, 98 U. S., 428; Miller v. Dale, 92 U. S., 473; Hanrick v. Barton, 16 Wall., 166; Spencer v. Lapsley, 20 How., 264; Christy v. Pridgeon, 4 Wall., 196; White v. Burnley, 20 How., 235; United States v. Hughes, 13 How., 1; United States v. Thomas Powers' Heirs, 11 How., 570; United States v. Philadelphia and New Orleans, 11 How., 609; Glenn v. United States, 13 How., 250; Menard v. Massey, 8 How., 293; Jourdan v. Barrett, 4 How., 169; Surgett v. Lapice, 8 How., 48; Chouteau v. Molony, 16 How., 203; Arguello v. United States, 18 How., 539; Marsh v. Brooks, 14 How., 513; Bissell v. Penrose, 8 How., 317; United States v. Hanson, 16 Pet., 196; United States v. Wiggins, 14 Pet., 334; United States v. Rodman, 15 Pet., 130; United States v. Desespine, 15 Pet., 319.

<sup>9</sup> Strother v. Lucas, 12 Pet., 410; Mitchell v. United States, 9 Pet., 711; Sonlard

United States, its courts take judicial notice of the laws which prevailed there up to the time of such acquisition, such laws being regarded not as foreign, but as the laws of an antecedent government.<sup>10</sup>

§ 56. **State Constitutions.**—"The Constitution of the United States," it has been observed, "assumes the existence of thirteen distinct governments over whose people its authority was to be extended, if ratified by conventions chosen for the purpose. Each of these States was then exercising the powers of government under some form of written constitution, and that instrument would remain unaffected by the adoption of the National Constitution, except in those, particulars in which the two would come in conflict, and as to those, the latter would modify and control the former."<sup>11</sup>

"But it must not be forgotten, in construing our Constitutions," says the same distinguished author, "that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions, declaratory of the rights of the subject, have acquired a well understood meaning which the people must be supposed to have had in view in adopting them."<sup>12</sup>

The Constitution of a State is the paramount law of the State, and when a legislative act conflicts with it, such act may be adjudged void as well by the Federal as the State courts.<sup>13</sup> And here we may note a difference in construing the Constitution of the United States and the Constitution of a State. The former is the Constitution of a government of enumerated powers, deriving its authority for their exercise from the Constitution itself. The latter is the Constitution of a

v. United States, 4 Pet., 511; Korn v. Mutual Assurance Society, 6 Cranch, 192; United States v. Moreno, 1 Wall., 400; Beard v. Federy, 3 Wall., 478; United States v. Repentigny, 5 Wall., 211.

<sup>10</sup> United States v. Perot, 98 U. S., 428.

<sup>11</sup> Cooley's Const. Lim. (4 ed.), 28. See p. 124, *ante*. When the provisions of a State Constitution or the ordinances of a State constitutional convention violate the inhibition of the Constitution of the United States against the passing of laws of impairing the obligation of contracts, the Federal courts will declare them void. See notes 127 and 128, p. 100, *ante*.

<sup>12</sup> Cooley's Const. Lim. (4 ed.), 73.

<sup>13</sup> Webster v. Cooper, 14 How., 488.

government possessing general powers of legislation. Hence the rule as thus stated: "When a law of Congress is assailed as void, we look in the National CONSTITUTION to see if the grant of specific powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the CONSTITUTION of the United States, or of the State, we are able to discover that it is prohibited. We look in the CONSTITUTION of the United States for grants of legislative power, but in the Constitution of the State to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the State was vested in its creation. Congress can pass no laws but such as the CONSTITUTION authorizes, either expressly or by clear implication, while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited."<sup>14</sup>

Another distinction, which it may be well to bring to view in this connection, is that the Federal courts, in determining whether the legislative enactment of a State contravenes the CONSTITUTION of the United States, do not feel themselves bound by the decisions of the State courts, but judge of the matter for themselves.<sup>15</sup> Whereas, in determining whether a State statute is in violation of the Constitution of a State, they follow, as conclusive upon them, the decisions of the highest court of the State; provided such decisions are not called in question by any conflicting opinion of such court.<sup>16</sup>

<sup>14</sup> Cooley's Const. Lim. (4 ed.), 210.

<sup>15</sup> *Jefferson Branch Bank v. Skelly*, 1 Black, 436. See also note 132, p. 101, *ante*.

<sup>16</sup> *Randall v. Brigham*, 7 Wall., 523; *Bank of Hamilton v. Dudley's Lessee*, 2 Pet., 492; *Elmendorf v. Taylor*, 10 Wheat., 156; *National Bank v. Town of Ottawa*, Sup. Ct. U. S., May 8, 1882, 4 Mor. Trans., 866; *Taylor v. City of Ypsilanti*, *Id.*, 326. In this last case the court, speaking through Mr. Justice Harlan, amongst other things, says: "The present case, then, appears to be this: Testing the rights and obligations of the parties by the law of the State as declared by this court, and as declared and acted upon by all the departments of the State government at and before the time when the railroad company entered upon the execution of its contract with the city, we should be obliged to reverse the judgment of the court below; whereas, if we accept the decision of the Supreme Court of Michigan, made after those rights accrued and after the railroad company had earned the bonds, as conclusive evidence of the constitutional invalidity of the act of March 22, 1869, the

State Constitutions are to be regarded, not so much as sources of rights, as instruments designed for their protection.<sup>17</sup> In addition, therefore, to the general framework of government, with its checks and balances, and limitations upon the powers of public functionaries,

judgment must be affirmed. The position taken by counsel for the city is that the established, settled construction, given by the highest court of a State, of the laws and Constitution of that State, must be deemed, in all cases, binding upon the courts of the Union; this, because the statute defining and regulating the jurisdiction of the Federal courts declares that the laws of the several States, when they apply, shall constitute rules of decision in cases at common law tried in those courts. This proposition, in the general terms in which it is announced, is undoubtedly supported by the language of some of the opinions which have emanated from this court. But all along through the reports of our decisions are to be found adjudications in which, upon the fullest consideration, it has been held to be the duty of the Federal courts, in all cases within their jurisdiction depending upon local law, to administer that law, so far as it affects contracts, obligations and rights, as it was judicially declared to be by the highest court of the State at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws. The sound and true rule, said Chief Justice Taney, in *Ohio Life Insurance Company v. Debolt*, 16 How., 432, is that if the contract, when made, is valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law. So in *City v. Lamson*, 9 Wall., 485, Mr. Justice Nelson, speaking for the court, said: 'It is urged, also, that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued the decisions of the courts of the State favored the validity of the law. The last decision cannot, therefore, be followed.'

"Again, in *Olcott v. Supervisors*, 16 Wall., 690, the court speaking through Mr. Justice Strong, said: 'This court has always ruled that if a contract, when made, was valid under the Constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature, or the judiciary, will be regarded by this court as establishing its invalidity.' To the like effect are some very recent decisions of this court. In *Douglas v. County of Pike*, 99 U.S., 687, upon a review of some of the previous cases, the court, speaking by the present chief justice, said that 'the true rule is to give a change of judicial construction in respect of a statute the same operation on contracts and existing contract rights that would be given to a legisla-

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<sup>17</sup> Cooley's Const. Lim. (4 ed.), pp. 46 and 47.

which they are expected to provide, we look to them for those great guarantees of the rights of persons and property which belong to the most favored freemen, such as enjoying and defending life and liberty, acquiring, possessing and defending property, pursuing and obtaining safety, freedom of religious and political opinions, and for such as afford security against the deprivation of life, liberty and property without due process of law.<sup>18</sup>

**§ 57. State Laws as Source of Rights and Rule of Decision Generally.**—Not only must we look for the protection and enforcement of our rights of person and property, except in the comparatively few cases in which jurisdiction is given to the Federal courts, exclusively to State tribunals, but, as a source of rights and rule of decision, State laws necessarily constitute a very large portion of the law administered by the courts of the United States. That this should be so is obvious, when we consider that the Federal government is the government of the Union of the States, exercising certain enumerated powers, for the most part, of a general and national character, and that it “can claim no powers which are not granted to it by the CONSTITUTION, and the powers actually granted must be such as are expressly given, or given by necessary implication.”<sup>19</sup> Whereas, the great reservoir of governmental powers and

tive amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.’

\* \* \* So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.” See also the Township of New Buffalo v. The Cambria Iron Company, Supt. Ct. U. S., March 27, 1882, 4 Mor. Trans., 353; *Fairfield v. County of Gallatin*, 100 U. S., 47.

<sup>18</sup> Cooley's Const. Lim. (4 ed.), p. 43, *et seq.*

<sup>19</sup> Per Marshall, Chief Justice, in *Martin v. Hunter's Lessee*, 1 Wheat., 304, p. 326; see also *Gibbons v. Ogden*, 9 Wheat., 1. In *United States v. Cruikshank*, 92 U. S., 542, it is said: “The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights

sovereignty for the protection of life and personal liberty, and for regulating the acquisition, enjoyment and disposition of property, remains with the States. The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other in their respective spheres.<sup>20</sup>

The laws of the United States and of the States "together form one system of jurisprudence, which constitutes the law of the land for the State, and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."<sup>21</sup> Thus a Federal court, when sitting within a State, is to be regarded as a *court of the State*, administering, where controversies are to be determined by State laws, the law of the case as the State court would.<sup>22</sup> By the Judici-

can be acquired under the Constitution or laws of the United States except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States." And again it is said: "The Federal government is one of delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States or to the people." Per McLean, J., in *Briscoe v. Bank of Kentucky*, 11 Pet., 257, p. 317. As to powers implied under the Constitution, see *Legal Tender Cases*, 12 Wall., 457; *McCulloch v. Maryland*, 4 Wheat., 316; *Rhode Island v. Massachusetts*, 12 Pet., 657; *Kohl v. United States*, 91 U. S., 367.

<sup>20</sup> Per McLean, J., in *License Cases*, 5 How., 504, p. 588. See also *Beer Company v. Massachusetts*, 97 U. S., 25, and cases cited in note 19, *supra*, and note 30, p. 204.

<sup>21</sup> Per Bradley, J., in *Claffin v. Houseman*, 93 U. S., 130. See note 207, p. 120, *ante*.

<sup>22</sup> *Green v. Neal*, 6 Pet., 291. In this case it is said: "The Federal court, when sitting within a State, is the court of that State, being so constituted by the Constitution and laws of the Union." And in another case it is remarked: "The relation of the courts of the United States to a State is the same as that of her own tribunals." *Suydam v. Williamson*, 24 How., 427. And in still another case it is said by Mr. Justice Swayne, speaking for the court in an equity case affecting title to real estate, that went up from Texas: "The controversy between the parties is to be decided according to the jurisprudence of Texas. We must administer the law of the case in all respects as if we were a court sitting there and reviewing the decree of an inferior court in that locality." *Slaughter v. Glenn*, 98 U. S., 242, citing *Olcott v. Bynum*, 17 Wall., 44. See also *Hinde v. Vattier*, 5 Pet., 398; *Wilkinson v. Leland*, 2 Pet., 666.



ary Act of 1789 it is provided: "That the laws of the several States, except where the CONSTITUTION, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."<sup>23</sup> The words *laws of the several States*, as here employed, comprehend, it should be observed, not only State legislative enactments, but State Constitutions, ordinances of State conventions, decisions of State courts, laws of former governments, and the common and civil law, as far as they form the basis of rights and have been adopted, and local customs which have the force of law."<sup>24</sup> And whilst the words "*in trials at common law*" are held

<sup>23</sup> See section 34 of this act, p. 25, *ante*, now section 721, Revised Statutes.

<sup>24</sup> As to what is law of a State generally, see cases referred to in note 236, p. 137, *ante*.

As to State Constitutions and State decisions thereon, see *Webster v. Cooper*, 14 How., 488; *Randall v. Brigham*, 7 Wall., 523; *Secombe v. Railroad Company*, 23 Wall., 108; *South Ottawa v. Perkins*, 94 U. S., 260; *Leavenworth v. Barnes*, 94 U. S., 70; *Fairfield v. Gallatin*, 100 U. S., 47. See note 16, p. 197, *ante*.

As to ordinances of State conventions, see *Davis v. Gray*, 16 Wall, 203.

As to decisions of State courts, the general rule is that the fixed and received construction by the courts of the State of the legislative enactments of the State, where they do not come in conflict with the Constitution, laws and treaties of the United States, are to be regarded as a part of the law. *Davie v. Briggs*, 97 U. S., 628; *Leffingwell v. Warren*, 2 Black, 599. In this last named case, say the court: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." Citing *Shelby v. Guy*, 11 Wheat., 361; *McCluny v. Silliman*, 3 Pet., 270; *Green v. Neal*, 6 Pet., 291; *Ross v. Duval*, 13 Pet., 45; *Masingall v. Downs*, 1 How., 767; *Nesmith v. Sheldon*, 1 How., 812; *Van Rensselaer v. Kearney*, 11 How., 297; *Webster v. Cooper*, 14 How., 504. The Federal courts will reverse their former decisions and follow the latest settled adjudication where the highest judicial tribunal of a State adopt new views as to the proper construction of a State statute. *Leffingwell v. Warren*, 2 Black, 599; *Tioga Railroad Company v. Blossburg and C. Railroad Company*, 20 Wall., 137; *Green v. Neal*, 6 Pet., 291; *United States v. Morrison*, 4 Pet., 124. See note 16, p. 197, *ante*. See also article in 14 Am. Law. Rev. (1880), p. 211, and notes to *Sonstiby v. Keeley*, 21 Am. Law Reg. (1882), p. 238.

As to laws of former government, see section 55, p. 195, and notes.

As to common and civil law, see section 53, p. 193, and notes, and section 55, p. 195, and notes.

As to customs and usages, see *United States v. Arredondo*, 6 Pet., 691-714; *Mitchell v. United States*, 9 Pet, 711; *Strother v. Lucas*, 12 Pet., 410; *Cookendorfer v.*

not to extend to criminal cases,<sup>26</sup> or to cases in equity<sup>26</sup> and admiralty,<sup>27</sup> still the inference is not to be indulged that State laws, with respect to rights, are not often acknowledged and enforced in courts, both of equity and of admiralty.<sup>28</sup>

Preston, 4 How., 317; *Burke v. McKay*, 2 How., 66; *Bliven v. New England Screw Company*, 23 How., 420; *Fowler v. Brantly*, 14 Pet., 318; *Robinson v. United States*, 13 Wall., 363.

<sup>26</sup> *United States v. Reid*, 12 How., 361; *United States v. Bedford Bridge Company*, 1 Wood. and M., 411; *United States v. Shepard*, 1 Abb., U. S., 431; *United States v. Mundell*, 1 Hughes, 415.

<sup>26</sup> *Neves v. Scott*, 13 How., 270; *Blanchard v. Sprague*, 1 Cliff., 288; *McFarlane v. Griffith*, 4 Wash., 585; *Johnston v. Roe*, 1 Fed. Rep., 692.

<sup>27</sup> *The Independence*, 2 Curtis, 350.

<sup>28</sup> *Ex Parte McNeil*, 13 Wall., 236. In this case a libel was filed in the District Court of the United States to recover pilotage under the pilot laws of New York. Judgment was rendered in favor of the libellant and an application was made to the Supreme Court of the United States for a writ of prohibition to restrain the District Court from enforcing the judgment. The following extract is taken from the opinion of the court: "It is urged further that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any Federal Court; but that is not a question in this case. A State law may give a substantial right of such a character, that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles and its determination is governed by the same considerations as if it had been brought in the proper State tribunal of the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction." Citing *The St. Lawrence*, 1 Black, 522; *The General Smith*, 4 Wheat., 438; *Peyroux v. Howard*, 7 Pet., 324; *Rules of Practice in Admiralty*, established by this court, Nos. 12 and 92. See also *The John Farron*, 14 Blatch., 24.

A large proportion of the cases decided on the equity side of the Federal courts are cases in which the rights of parties are determined by the local laws of the several States. See remarks of court in *Slaughter v. Glenn*, 98 U. S., 242, quoted in note 22, p. 200, *ante*. In *Ewing v. City of St. Louis*, 5 Wall., 413, which was a suit in equity, the court say: "The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the State courts. If, in the latter courts, equity would afford no relief, neither will it in the former." See also *Brine v. Insurance Company*, 96 U. S., 627; *Smith v. Railroad Company*, 99 U. S., 398; *Allis v. Insurance Company*, 97 U. S., 144; *Orvis v. Powell*, 98 U. S., 176; *Swift v. Smith*, 102 U. S., 442; *Payne v. Hook*, 7 Wall., 425.

There is a distinction, too, between laws which confer or pertain to rights, and those designed to regulate matters of mere remedy and practice. It is only the former which are to be "regarded as rules of decision."<sup>29</sup>

With these general observations, we shall, as the best method of illustrating the extent to which State laws enter into and affect the adjudication of rights in the Federal courts, take up some of the more prominent heads to which, as rules of decision, such laws apply, and give in connection therewith the recognized doctrines upon the subject.

<sup>29</sup> *Wayman v. Southard*, 10 Wheat., 1, is the first case in which the court was called upon to construe the thirty-fourth section of the Judiciary Act (Revised Statutes, section 731), and Mr. Chief Justice Marshall, in delivering the opinion, remarked:

"This section has never, so far as is recollected, received a construction in this court, but it has, we believe, been generally considered by gentlemen of the profession as furnishing a rule to guide the court in the formation of its judgment, not one for carrying that judgment into execution. It is 'a rule of decision,' and the proceeding after judgment are merely ministerial. It is, too, a rule of decision 'in trials at common law,' a phrase which presents clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution or proceedings after judgment, or the effect of those proceedings." And, further, "As construed by this court, this section is the recognition of a principle of universal law; the principle that, in every forum, a contract is governed by the law with a view to which it is made."

*Miles v. Caldwell*, 2 Wall., 35, was ejectment in the circuit court of Missouri, and involved, among other things, the effect to be given to the Revised Statutes of that State concerning the action of ejectment, which provided: "A judgment, except of non-suit, in an action authorized by this act, shall be a bar to any other action between the same parties or those claiming under them as to the same subject-matter." The court says on this point: "We hold this enactment to be binding on the Federal courts, as well as those of the State. It is a rule of property. It concerns the stability of titles to land, and it would be highly improper to adopt in the Federal courts a rule tending to increase litigation and unsettle those titles, which is in conflict with the one prescribed by the law-making power of the State. It is a matter which involves something more than a mere rule of practice. It is a question, whether a matter, which is conclusive of the title to land in the State courts, shall have the same effect in the Federal courts. It is our opinion that it should."

See also *Bank v. Halstead*, 10 Wheat., 51; *Beers v. Haughton*, 9 Pet., 329; *Ross v. Duval*, 13 Pet., 45. The extent to which State laws may control or affect the practice in the Federal courts depends not upon this (the thirty-fourth) section, but upon other acts of Congress.

**§ 58. State Laws—Personal Liberty and Security—Freedom of Conscience and Opinion.**—The power of moving ones self, to whatsoever place ones own inclination may direct, without imprisonment and restraint, except by due course of law; the peaceable enjoyment of life, limb, body, health and reputation; and the free exercise of conscience in matters of religious belief, and the expression of ones political sentiments, are all subjects of State constitutional guarantees and State legislative supervision and protection. And in all matters affecting these great rights, save in so far as Federal constitutional limitations may control State action, or Federal legislation may rightfully cover the same ground, we are remitted exclusively to State laws and State tribunals.<sup>30</sup>

**§ 59. State Laws — Personal Status — Citizenship — Alienage.**—We have already considered who are citizens and who are aliens under the CONSTITUTION and laws of the United States.<sup>31</sup> “We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.”<sup>32</sup> For his rights as a citizen of a State he must

<sup>30</sup> United States v. Cruikshank, 92 U. S., 542; Slaughter House Cases, 16 Wall., 36; United States v. DeWitt, 9 Wall., 41; Davidson v. New Orleans, 96 U. S., 97; Gilman v. Philadelphia, 3 Wall., 713; Patterson v. Kentucky, 97 U. S., 503; Railroad Company v. Husen, 95 U. S., 465; Fertilizing Company v. Hyde Park, 97 U. S., 659; Chy Lung v. Freeman, 92 U. S., 275. In *Le Grand v. United States*, 12 Fed. Rep., 577, Mr. Justice Woods holds section 5519, Revised Statutes, unconstitutional, because not authorized by the Constitution. He says: “The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right.” See also note 33, *infra*.

<sup>31</sup> As to citizens, see p. 60, *et seq.*, *ante*, and as to aliens, p. 92, *ante*.

<sup>32</sup> United States v. Cruikshank, 92 U. S., 542, p. 549.

look to the Constitution and laws of the State, of which he is a citizen.<sup>33</sup>

**§ 60. State Laws—Domestic Relations—Husband and Wife—Divorce.**—The authority rests with the several States to

<sup>33</sup> See authorities referred to in note 30, p. 204, *ante*. *United States v. Cruikshank*, 92 U. S., 542, citing *Slaughter House Cases*, 16 Wall., p. 72. From this last named case we extract as follows:

"The first section of the fourteenth article (of amendment to the Constitution of the United States), to which our attention is more specially invited, opens with a definition of citizenship; not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It has been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It has been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within United States, were not citizens. Whether this proposition was sound or not, has never been judicially decided. But it has been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African decent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled, and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race, who have recently been made freemen, were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution. To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of difference of opinions. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making *all persons* born within the United States, and subject to its jurisdiction, citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

"The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside

regulate the domestic relations, and to say who may and who may not marry within their respective limits.<sup>34</sup> Hence, in passing upon the validity of a marriage in a particular State, the Federal courts are governed by the law of such State.<sup>35</sup> So a decree of divorce

within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear then that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

"We think this distinction, and its explicit recognition in this amendment, of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States; and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

"The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the words citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider, but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced by this paragraph of the amendment. The first occurrence of the words 'privileges and immunities' in our constitutional history is to be found in the fourth of the articles of the old confederation. It declares 'that the better to secure and perpetuate mutual friendship and intercourse among the people of the different

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<sup>34</sup> Barber v. Barber, 21 How., 582; *Ex Parte Kinney*, 3 Hughes, 9; *Ex Parte Hobbs*, 1 Woods's, 537; *Ex Parte Francois*, 3 Woods's, 367, per Duval, J. Afterwards reversed on appeal by Woods, C. J. 12 Cen. L. J., 217.

1 Bishop Mar. and Div., section 87. See also article in 13 Cen. L. J. (August 19, 1881), p. 121, on Miscegenetic Marriages.

Marriage in Territories controlled by Congress. *Reynolds v. United States*, 98 U. S., 145.

<sup>35</sup> *Meister v. Moon*, 96 U. S., 76.

effectual by the law of the State in which it is obtained will be held good in all other States.<sup>36</sup> And while the Federal courts are without jurisdiction to grant divorces, they may enforce the decrees of State courts for alimony,<sup>37</sup> and may, it has been held, where the citizenship

States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States, and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively.'

"In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of Confederation we have some of these specifically mentioned, and enough, perhaps, to give some general idea of the class of civil rights meant by the phrase. Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington, in the Circuit Court for the District of Pennsylvania, in 1823 (4 Wash., 371.) 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'

"This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland* (12 Wall., 430), while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized governments are instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the con-

<sup>36</sup> *Cheever v. Wilson*, 9 Wall., 108.

<sup>37</sup> *Barber v. Barber*, 21 How., 532. See also *Cheever v. Wilson*, 9 Wall., 108; *Fitch v. Cornell*, 1 Sawy., 156.

of the parties is such as to give jurisdiction, enforce, by *habeas corpus*, the decree of a State court, rendered in a divorce suit, awarding the custody of a child to one of the parents.<sup>38</sup> With respect to the rights and liabilities of the husband, and the rights and disabilities of the

stitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

"In the case of *Paul v. Virginia* (8 Wall., 180), the court, in expounding this clause of the Constitution, says that 'The privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws, by virtue of their being citizens.'

"The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State government over the rights of its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

"It would be the vainest show of learning to attempt to prove by citations of authority that, up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States; such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government? Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal government. And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this, and more, must follow if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress wherever, in its discretion, any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper, on all such subjects. And still further, such a construction, followed by the

<sup>38</sup> *Bennett v. Bennett*, Deady, 299.



wife and the effect of the marriage relation on the tenure and transfer of property, we look primarily to State law.<sup>39</sup> A married woman, under the Constitution and laws of the United States, may be a citizen of the United States and of the State in which she resides.<sup>40</sup> And while the domicil of the wife usually follows that of the husband,<sup>41</sup> yet a wife may acquire a domicil different from her husband's,

reversal of the judgments of the Supreme Court of Louisiana in these cases would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other, and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

<sup>39</sup> The following, which are but a few of the many cases on the subject, will sufficiently illustrate the statement in the text: As to rights and liabilities of husband, see *Kitchen v. Bedford*, 13 Wall., 413; *Walker v. Walker*, 9 Wall., 743; *Price v. Sessions*, 3 How., 624; *Marshall v. Beall*, 6 How., 70; *In re Brandt*, 5 Biss., 217; *Partee v. Thomas*, 11 Fed. Rep., 769; *In re Wood*, 5 Fed. Rep., 443.

As to rights and legal capacities, and incapacities, of wife, see *Sims v. Everhardt*, 102 U. S., 300; *Bank v. Partee*, 99 U. S., 325; *Voorhees v. Bonesteel*, 16 Wall., 16; *Avery v. Doane*, 1 Biss., 64; *In re Kinkead*, 3 Biss., 405; *Flanders v. Abbey*, 6 Biss., 16; *Williams v. King*, 13 Blatch., 282; *Mitchell v. Lippincott*, 2 Woods's, 467; *Re Ruddell*, 2 Low., 124; *Norton v. Meader*, 4 Sawy., 603; *March, Price & Co. v. Clark*, 9 Fed. Rep., 753; *Hobart v. Johnson*, 8 Fed. Rep., 493; *Parsons v. Dennis*, 7 Fed. Rep., 317; *Warford v. Noble*, 2 Fed. Rep., 202.

As to tenure and transfer of property, see *Carite v. Trotot*, Sup. Ct. U. S., May 8, 1882, 4 Mor. Trans., 782; *Aldridge v. Muirhead*, 101 U. S., 397; *Slaughter v. Glenn*, 98 U. S., 242; *Conner v. Elliott*, 18 How., 591; *Randall v. Kreiger*, 23 Wall., 137; *Drury v. Foster*, 2 Wall., 24; *Rhea v. Rhenner*, 1 Pet., 105; *Star v. Hamilton*, Deady, 268; *In re Brandt*, 5 Biss., 217; *Elliott v. Teal*, 5 Sawy., 249; *Tolman v. Leathers*, 2 Fed. Rep., 653.

<sup>40</sup> See page 60, *et seq.*, *ante*.

<sup>41</sup> 2 Bishop's Marriage and Divorce, chapter 9, section 124, *et seq.*; 2 Bishop on Married Women, section 157.

whenever it is necessary or proper that she should have such a domicile, and on such a domicile, if the case otherwise allow, may institute proceedings for divorce, though it be neither her husband's domicile nor have been the domicile of the parties at the time of the marriage or of the offense.<sup>42</sup>

**§ 61. State Laws — Parent and Child—Infants.**—The legal rights and duties resulting from the parental relation, in so far as municipal law takes cognizance of them, naturally fall under the supervision of the States.

It is by State law that the question of legitimacy or illegitimacy must generally be determined,<sup>43</sup> and the rights of illegitimate children as heirs be settled.<sup>44</sup> The parent's right to the custody of a child,<sup>45</sup> and the parent's rights of action for personal injuries<sup>46</sup> to a child, may, in proper cases, be enforced in the courts of the United States. The law touching the citizenship and naturalization of children has already been noticed.<sup>47</sup> The domicile of an infant is that of his parent,<sup>48</sup> and it is with each State to fix the period of majority.<sup>49</sup> With reference to the legal capacities and incapacities of infants, and the management and disposition of their property, we consult, for the

<sup>42</sup> *Cheever v. Wilson*, 9 Wall., 108; *Barber v. Barber*, 21 How., 582; 2 Bishop on Marriage and Divorce, chapter 9, section 124, *et seq.*

<sup>43</sup> *Gaines v. New Orleans*, 6 Wall., 642; *Blackburn v. Crawfords*, 3 Wall., 175; *Gaines v. Hennen*, 24 How., 553.

<sup>44</sup> *Rogers v. Weller*, 5 Biss., 166; *Brewer v. Blougher*, 14 Pet., 178; *Stevenson v. Sullivan*, 5 Wheat., 207; *Gregg v. Tesson*, 1 Black, 150.

<sup>45</sup> See *Bennett v. Bennett*, Deady, 299, where the court granted *habeas corpus* to enforce decree of State court in divorce suit awarding custody of child to one of the parents, the parties being citizens of different States. See also *United States v. Green*, 3 Mason, 482; but see *Ex Parte Everts*, 1 Bond, 197.

<sup>46</sup> *Sullivan v. Union Pacific Railroad*, 3 Dill., 334. See *Plummer v. Webb*, 4 Mason, 380, where it was held the father might maintain a suit in admiralty for the tortious abduction of his minor son on a voyage on the high seas, etc. See also *Steele v. Thatcher*, Ware, 91; *Sherwood v. Hall*, 3 Sumn., 127.

<sup>47</sup> See p. 60, *et seq.*, *ante*. See also Revised Statutes, section 2167.

<sup>48</sup> *Shanks v. Dupont*, 3 Pet., 242; *Sprague v. Litherberry*, 4 McLean, 442; Schouler's Domestic Relations (2 ed.), \*412 and \*413; Rorer on Inter-State Law, 188; Wharton's Conflict Laws, section 35, *et seq.*

<sup>49</sup> Schouler's Domestic Relations (2 ed.), \*518, *et seq.*

most part, State laws.<sup>50</sup> The courts of the United States will watch over and protect the interests of infants in all suits to which they are parties therein,<sup>51</sup> and infants have the privilege of removing causes from the State to the Federal courts.<sup>52</sup>

**§ 62. State Laws—Guardian and Ward—Master and Apprentice.**—It belongs to the several States to provide for the appointment of guardians of the persons and property of infants, and to prescribe the manner in which such guardians shall perform their duties.<sup>53</sup> This, however, does not prevent Congress from making it a penal offense for a guardian to convert to his own use the pension money of his ward, received by him from the government.<sup>54</sup>

Guardians are restricted in the exercise of authority over the persons and property of their wards to the States in which they are appointed.<sup>55</sup> The relation between master and apprentice is also statutory and local,<sup>56</sup> but a colored person, it has been held, apprenticed

<sup>50</sup> As to legal capacities and incapacities, see *Sims v. Everhardt*, 102 U. S., 300; *Vasse v. Smith*, 6 Cranch, 226.

The deed of an infant held to be voidable and not void: *Irvine v. Irvine*, 9 Wall., 617; *Nettleton v. Morrison*, 5 Dill., 503. See Wharton's Conflict Laws, section 112, *et seq.*

As to property of infants, see *Hoyt v. Sprague*, 103 U. S., 613; *Telegraph Company v. Davenport*, 97 U. S., 369; *Knotts v. Stearns*, 91 U. S., 638; *Ward v. New England Screw Company*, 1 Cliff., 565; *Hoyt v. Hammekin*, 14 How., 346.

<sup>51</sup> *Bank of United States v. Ritchie*, 8 Pet., 128; *Coulson v. Walton*, 9 Pet., 62; *Telegraph Company v. Davenport*, 97 U. S., 369; *Insurance Company v. Bangs*, 103 U. S., 435.

<sup>52</sup> *Wooldridge v. McKenna*, 8 Fed. Rep., 650.

<sup>53</sup> *Hoyt v. Sprague*, 103 U. S., 613; *Telegraph Company v. Davenport*, 97 U. S., 369; *Knotts v. Stearns*, 91 U. S., 638; *Mathewson v. Sprague*, 1 Curtis, 457; *Sprague v. Litherberry*, 4 McLean, 442; *Seaverns v. Gerke*, 3 Sawy., 353; *Hart v. Gray*, 3 Sumn., 339; *Gager v. Henry*, 5 Sawy., 237; *Miller v. Sullivan*, 4 Dill., 340; *Hobart v. Upton*, 2 Sawy., 302; *Lobrano v. Nelligan*, 9 Wall., 295; *Ward v. New England Screw Company*, 1 Cliff., 565; *Van Ness v. Bank of United States*, 13 Pet., 17; *Micou v. Lamar*, 7 Fed. Rep., 180; *Nettleton v. Mosier*, 3 Fed. Rep., 387; *Sprigg v. Stump*, 8 Fed. Rep., 207; *Linton v. First National Bank*, 10 Fed. Rep., 894.

<sup>54</sup> *United States v. Hall*, 98 U. S., 343.

<sup>55</sup> *Powers v. Mortel*, 4 Am. Law Reg., 427; *Woodworth v. Spring*, 4 Allen, 321; *Story's Conflict Laws*, sections 504 and 504a; *Schouler's Domestic Relations* (2 ed.), \*443, *et seq.*

<sup>56</sup> See *Schouler's Domestic Relations* (2 ed.), \*604 and \*605.

under a State law which provides for such persons being apprenticed on terms much less favorable to them than those provided for white persons, will be discharged.<sup>57</sup>

§ 63. **State Laws—Contracts—Lex Loci.**—The laws of a State, existing at the time a contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.<sup>58</sup>

And, generally, we look to the law of the State in which a contract is made to determine its validity and meaning.<sup>59</sup>

If valid by the law of the State where made, it will ordinarily be upheld in every other State, and, in some instances, may be enforced in another State, although, tested by the *lex fori*, it would be adjudged void.<sup>60</sup> But this doctrine is not to be pushed to the extent of

<sup>57</sup> *Ex Parte Turner*, Chase, 157; S. C., 1 Abb. U. S., 84.

<sup>58</sup> *Brine v. Insurance Company*, 96 U. S., 627; *Edwards v. Kearzey*, 96 U. S., 595; *Bronson v. Kinzie*, 1 How., 311; *Clark v. Reyburn*, 8 Wall., 318; *Van Hoffman v. City of Quincy*, 4 Wall., 535; *Green v. Biddle*, 8 Wheat., 1; *McCracken v. Hayward*, 2 How., 608; *Ogden v. Saunders*, 12 Wheat., 213; *Walker v. Whitehead*, 16 Wall., 314.

<sup>59</sup> It is said by Mr. Justice Hunt, speaking for the court in *Scudder v. Union National Bank*, 91 U. S., 406: "Matters bearing upon the execution, interpretation and the validity of a contract are determined by the law of the place where the contract is made." See also *Gay v. Alter*, 102 U. S., 79; *Pence v. Langdon*, 99 U. S., 578; *Garfield v. Paris*, 96 U. S., 557; *Brabston v. Gibson*, 9 How., 263; *Cox v. United States*, 6 Pet., 172; *Bulkley v. Honold*, 19 How., 390. In this last case it is said: "It was also argued that this contract was not to be governed by the laws of Louisiana, but by the laws of New York, where the vendors resided. But the contract was made and performed in Louisiana, and must be governed by its laws. (*Boyle v. Zacharie*, 6 Pet., 635; *Cox v. United States*, 6 Pet., 172; *Bell v. Bruin*, 1 How., 169.) The counsel for the plaintiff in error also urged that if the law of Louisiana ought to govern the contract, that law was to be found, not in the civil code of that State, but in the general commercial law of the country. Without pausing upon the difficulties which otherwise might attend this proposition, we think it sufficient to say that we find the subject of sales, with the obligations which attend them, regulated by the civil code of Louisiana, and we see no sound reason why sales of vessels are not within those laws." See *Bishop on Contracts*, section 730.

<sup>60</sup> In *DeWolf v. Johnson*, 10 Wheat., 367, it was held that in a contract for the loan of money, the place of the loan where the contract is made is to govern, and that it is immaterial that the loan was to be secured by mortgage on lands in another State; and, further, that in such a case the statutes of usury of the State where the contract

holding a contract valid in another State if made in fraud or evasion of its laws, or contrary to its policy and institutions, however valid it might be in the State where made.<sup>61</sup> Contracts made in one State to be performed in another State, are to be governed by the laws of the

was made, and not those of the State where it is secured by mortgage, are to govern it, unless there be some other circumstance to show that the parties had in view the law of the latter State. See also *Railroad Company v. Bank of Ashland*, 12 Wall., 226; *Andrews v. Pond*, 13 Pet., 65; *Burrows, Hall & Co. v. Hannegan*, 1 McLean, 315; *Fitch v. Remer*, 1 Biss., 337.

In *Miller v. Tiffany*, 1 Wall., 298, the defense chiefly relied on was usury. From the opinion of the court, delivered by Mr. Justice Swayne, we extract as follows: "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. (*Andrews v. Pond*, 13 Pet., 77 and 78; *Curtis et al. v. Leavitt*, 15 N. Y., 92; *Berrien v. Wright*, 26 Barbour, 213.)

"The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate. (*Depean v. Humphrey*, 20 How., 1; *Chapman v. Robinson*, 6 Paige, 634.)

"These rules are subject to the qualifications that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there, it is so everywhere. (*Andrews v. Pond*, 13 Pet., 78; *Mix et al. v. The Madison Insurance Company*, 11 Ind., 117; *Corcoran & Riggs v. Powers et al.*, 6 Ohio State, 19.)"

*Caldwell v. Carrington*, 9 Pet., 86, with which we conclude this note, was this character of case: A bill was filed in the Circuit Court of the United States for the district of Kentucky, claiming certain lands in Kentucky, under an agreement, by parol, by Carrington with Williams for an exchange of lands, and in which exchange C., the husband and devisor of the claimant, agreed to give certain lands, then owned by him in Virginia, to W., and of which W. took possession, and part of which he sold, and for which W. was to convey certain military lands in Kentucky to C. The bill prayed that the heir of W. should be decreed to convey the lands, and that certain persons, who, knowing the agreement between C. and W., had purchased from the heir of W., and who had obtained from the heir of W. a legal title to a part of the same lands, should be decreed to convey the same to the complainant.

The court held that although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract in this case by Carrington, by conveying to Williams the land he agreed to give to Williams in exchange, prevented the operation of the statute in this case. This was undoubtedly supposed in Virginia to be the sound construction of the statute when this contract was made; and as the lands then lay in Virginia, Kentucky being then a part of that State, this construction formed the law of contract.

<sup>61</sup> *Andrews v. Pond*, 13 Pet., 65; Story's Conflict Laws, section 242, *et seq.*

place of performance;<sup>62</sup> and where they are to be performed partly in the State where made and partly in another State, the law of the State in which they are made prevails.<sup>63</sup>

No law of a State, it may be added in conclusion, inconsistent with the terms of a contract made with or payable to parties out of the State, can have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the State.<sup>64</sup>

**§ 64. State Laws—Contracts—Lex Fori.**—The law of the forum or State in which suit is brought governs in all matters pertaining to the remedy, such as the bringing of suit, admissibility of evidence, statutes of limitation, etc.<sup>65</sup> And where, by the laws of a

<sup>62</sup> *Andrews v. Pond*, 13 Pet., 65; *Scudder v. Union National Bank*, 91 U. S., 406. *Railroad Company v. Bank of Ashland*, 12 Wall., 226; *Providence County Savings Bank v. Frost*, 14 Blatch., 233.

<sup>63</sup> *Morgan v. New Orleans, M. & I. Railroad Company*, 2 Woods's, 244.

<sup>64</sup> *State Tax on Foreign Bonds*, 15 Wall., 300.

<sup>65</sup> *Scudder v. Union National Bank*, 91 U. S., 406. In *Bank of United States v. Donnelly*, 8 Pet., 361, Mr. Justice Story, delivering the opinion of the court, says:

"But whatever may be the legislation of a State as to the obligation or remedy on contracts, its acts can have no binding authority beyond its own territorial jurisdiction. Whatever authority they have in other States, depends upon principles of international comity and a sense of justice. The general principle adopted by civilized nations is that the nature, validity, and interpretation of contracts are to be governed by the law of the country where the contracts are made or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky on an unsealed contract made in that State, therefore, a like action will lie another State, where covenant can be brought only on a contract under seal. It is an appropriate part of the remedy, which every State prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought. The nature, validity, and interpretation of the contract may be admitted to be the same in both States; but the mode by which the remedy is to be pursued, and the time within which it is to be brought, may essentially differ. The remedy, in Virginia, must be sought within the time, and in the mode, and according to the descriptive characters of the instrument, known to the laws of Virginia, and not by the description and characters of it prescribed in another State. An instrument may be negotiable in one State which yet may be incapable of negotiability by the laws of another State, and the remedy must be in the courts of the latter on such instrument, according to its own laws."

See also *Wilcox v. Hunt*, 13 Pet., 378; *Townsend v. Jemison*, 9 How., 407.

<sup>66</sup> *Le Roy v. Beard*, 8 How., 451. See also *Camfrancue v. Burnell*, 1 Wash., 340;

State in which a contract is made, a scroll has the same effect as a seal, an action upon such contract, in another State, where the scroll has no such effect, must be appropriate to unsealed instruments.<sup>66</sup> And where interest is allowed, not under contract, but by way of damages, the rate must be according to the *lex fori*.<sup>67</sup>

§ 65. **State Laws—Real Estate.**—Mr. Justice Field, speaking for the court, in *United States v. Fox*,<sup>68</sup> thus states the general rule upon the subject:

*Hinkley v. Marean*, 3 Mason, 88; *Mathuson v. Crawford*, 4 McLean, 540; *Smith & Sample v. Atwood & Co.*, 3 McLean, 545; *Reimsdyk v. Kane*, 1 Gallis, 371; *Blaine v. Drummond*, 1 Brock., 62.

<sup>67</sup> *Goddard v. Foster*, 18 Wall., 123. See also *Story's Conflict Laws*, chapter 14 (7 ed.), p. 676.

<sup>68</sup> 94 U. S., 315. Where no Federal question arises, the title to and disposition of real property, and the rights and remedies, not matters of mere practice, pertaining thereto, are exclusively subject to the laws of those States where the land is situated. The importance of this principle will justify its illustration.

*United States v. Crosby*, 7 Cranch., 115, was this: By the laws of Massachusetts no estate of freehold in land could be conveyed unless by a deed of conveyance under the hand and seal of the party. The United States claimed the land in controversy, which was situated in Massachusetts, under one Dowse, from a instrument executed in his favor by one Nelson. The instrument was executed in the island of Grenada, in the West Indies, before a notary public, according to the mode prescribed by the existing laws to pass real estate in that colony, and both parties were at that time residents there. In delivering the opinion of the court, Mr. Justice Story said: "The question presented for consideration is whether the *lex loci contractus* or the *lex loci rei sitae* is to govern in the disposal of real estates. The court entertain no doubt on the subject, and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated." See also *Polk v. Wendell*, 9 Cranch., 87; *Preston v. Browder*, 1 Wheat., 115; *Robinson v. Campbell*, 3 Wheat., 212; *Thather v. Powell*, 6 Wheat., 119; *Kerr v. Moon*, 9 Wheat., 565.

In *McCormick v. Sullivan*, 10 Wheat., 192, Mr. Justice Washington, delivering the opinion of the court, says: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." And in *Darby v. Mayer*, 10 Wheat., 465, it is said: "Upon general principles, there is no question that lands in Tennessee must, in all respects, be subject to the land laws of Tennessee." See also *Inglis v. Trustees*, 3 Pet., 99; *Green v. Neal*, 6 Pet., 291; *Clark v. Smith*, 13 Pet., 195.

In *McGoon v. Scales*, 9 Wall., 23, it is held that the law of a State abolishing passive trusts, which require no duty to be performed by the trustee, and vests the title in the *cestui que trust*, is binding on the Federal courts in a suit originating in such

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." (Citing *McCormick v. Sullivan*, 10 Wheat., 202.) He continues:

"The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly, or by necessary implication, transferred to the Federal government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State."

In *Bodley v. Taylor*,<sup>69</sup> involving the question of priority of title, based upon entries and surveys made under the laws of Kentucky, Mr. Chief Justice Marshall uses this language:

"Was this, then, a case of the first impression, the court would strongly incline to the opinion that Bodley and Hughes ought not to receive a conveyance for the lands within Taylor's survey, and not within his entry, but on the condition of their consenting to convey to

State. In this case it is said: "It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

See *Walker v. State Harbor Commissioners*, 17 Wall., 648, where the court followed the construction of the Supreme Court of California of the words "tide lands," as used in a statute of that State. Mr. Justice Field, in concluding the opinion of the court, used these words: "As has been often remarked, infinite mischief would result if, in construing State statutes affecting titles to real property, where no Federal question is involved, a different rule were adopted by the Federal tribunals from that of the State courts."

<sup>69</sup> 5 Cranch., 191.



him the lands they hold which were within his entry and are not included in his survey. But this is not a case of the first impression. The court is compelled to believe that the principle is really settled in a manner different from that which this court would deem correct. It is impossible to say how many titles might be shaken by shaking the principle. The very extraordinary state of land titles in that country has compelled its judges, in a series of decisions, to rear up an artificial pile, from which no piece can be taken by hand not intimately acquainted with the building; without endangering the structure, and producing a mischief to those holding under it, the extent of which may not be perceived."

The same distinguished judge says, in another case, that "In construing the statutes of a State on which land titles depend, infinite mischief would ensue should this court observe a different rule from that which has been long established in the State." The case under consideration turned upon the sufficiency of the proof of a deed under an act of the Legislature of Pennsylvania. The State rule, holding the proof sufficient, was followed. But it was said, "were the act now for the first time to be construed, the opinion of this court would certainly be that the deed was not regularly proved."<sup>70</sup>

Not only do the Federal courts adopt the local law of real property, as ascertained by the decisions of the State courts upon statutes, but they follow such decisions, when applied to the title of land, though grounded upon the common law.<sup>71</sup>

<sup>70</sup> McKean v. Delancy, 5 Cranch, 22. In deciding on the title to real property in the different States, the Circuit Courts of the United States are bound to decide as the State courts ought to do, for the rules of property, whether derived from the laws or adjudications of the judicial tribunals of a State, furnish the guides and rules in those of the Union in all cases to which they apply (*Hinde v. Vattier*, 5 Pet., 398; *Wilkinson v. Leland*, 2 Pet., 627), and the Supreme Court of the United States administer the law of the case, in all respects, as if they were a court sitting in the particular State and reviewing the decree of an inferior court in that locality. *Slaughter v. Glenn*, 98 U. S., 242; *Olcott v. Bynum*, 17 Wall., 44.

<sup>71</sup> In *Jackson v. Chew*, 12 Wheat., 153, involving a construction of devise in New York, the court say: "It has been urged, however, at the bar that this court applies this principle only to State constructions of their own statutes. It is true that many of the cases in which this court has deemed itself bound to conform to State

It may also be stated that laws affecting land titles of a former government, out of whose territory a new State is carved, are as much local laws of such new State as if they had originated in her legislation. The interpretation placed thereon by the courts within the jurisdiction of a State is a part of the law, as much so as if incorporated in the body of it by the legislature. If the same law be interpreted differently in different States, the Federal courts, nevertheless, follow, as a rule of action, the interpretation given in the particular State having jurisdiction of the subject-matter, thus sometimes enforcing a different rule with respect to the same law in one State from that which obtains in another.<sup>72</sup>

**§ 66. State Laws — Personal Property.**—The law of the State in which the owner is domiciled will generally determine the validity of the transfer or alienation of personal property, unless the laws and policy of the State where the property is located has prescribed a different rule.<sup>73</sup>

decisions have arisen on the construction of statutes. But the same rule has been extended to other cases, and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This court adopts the State decisions, because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute law of the State, when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity; otherwise the peculiar construction of the judicial tribunals of the States and of the United States would be productive of the greatest mischief and confusion."

In *Beauregard v. New Orleans*, 18 How., 497, it is said by the court: "The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title of lands."

In *Miles v. Caldwell*, 2 Wall., 35, speaking for the court, Mr. Justice Miller says: "Reverting now to the question of policy, grounded on the supposed sanctity of land titles, as affecting the conclusiveness of judgments in trespass or ejectment, we remark that it is the settled doctrine of this court, in reference to all questions affecting the title to real estate, to permit the different States of the Union to settle them each for itself; and when the point involved is one which becomes a rule of property, we follow the decisions of the State courts, whether founded on the statutes of the States or their views of general policy."

<sup>72</sup> *Christy v. Pridgeon*, 4 Wall., 196; *United States v. Perot*, 98 U. S., 429; *Arguello v. United States*, 18 How., 539.

<sup>73</sup> "It is well settled as a doctrine of international jurisprudence," says Mr. Justice

A voluntary assignment for the benefit of creditors, the assignor and assignee residing in the State where the property is situated, will be held good as against creditors living in another State, though, by the laws of such other State, the assignment is void.<sup>74</sup> When, however, such assignments are sought to be enforced in States other than those in which they are made, they may be subject to *bona fide* transfers and intervening liens.<sup>75</sup> Bonds, mortgages, etc., as personal property, follow the owner's domicil.<sup>76</sup>

And so when a person dies intestate, the law of his domicil governs the distribution of his personal estate.<sup>77</sup>

Story, "that personal property has no locality, and that the law of the owner's domicil is to determine the validity of the transfer or alienation thereof, *unless there is some positive or customary law of the country where it is found to the contrary.*" *Black v. Zacharie*, 3 How., 483.

Say the court in the case of *Green v. Van Buskirk*, 7 Wall., 139: "We do not propose to discuss the question how far the transfer of personal property, lawful in the owner's domicil, will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives."

In this case it was held that by the laws of Illinois an attachment on personal property there took precedence of an unrecorded mortgage executed in New York, where record was not necessary, though the owner of the personal property, the attaching creditor, and the mortgage creditor were all residents of New York.

See also *Hervey v. R. I. Locomotive Works*, 93 U. S., 664; *Heryford v. Davis*, 102 U. S., 235; *Fosdick v. Schall*, 99 U. S., 235; *Crapo v. Kelly*, 16 Wall., 610; *Green v. Van Buskirk*, 5 Wall., 307; *Brashear v. West*, 7 Pet., 608; *Hart v. Smith and Barney Manufacturing Company*, 7 Fed. Rep., 543; *Perry Manufacturing Company v. Brown*, 2 Wood. and M., 449; *Rorer on Inter-State Law*, chapter 20, p. 194.

<sup>74</sup> *Livermore v. Jenckes*, 21 How., 126. See also *Brashear v. West*, 7 Pet., 608; *Black v. Zacharie*, 3 How., 483.

<sup>75</sup> *Green v. Van Buskirk*, 5 Wall., 307, and authorities cited in note 73, *supra*. Wharton's Conflict Laws, section 353, *et seq.*

<sup>76</sup> *State Tax on Foreign Bonds*, 15 Wall., 300; *Murray v. Charleston*, 96 U. S., 432.

Shares in a national bank may be separated from the person of their owner and given by law a *situs* for taxation. *Tappan v. Merchant's National Bank*, 19 Wall., 490. See also *Kirtland v. Hotchkiss*, 100 U. S., 491.

<sup>77</sup> *Ennis v. Smith*, 14 How., 403. See also *Story's Conflict Laws*, section 480, *et seq.*; Wharton's Conflict Laws, section 561, *et seq.*; *Rorer on Inter-State Law*, 200.

**§ 67. State Laws—Descent and Distribution—Wills—Executors and Administrators.**—Both the descent and devise of lands are governed by the law of the State in which the lands are situated,<sup>78</sup> whilst the distribution and testamentary disposition of personal property is governed by the law of the State in which the intestate or testator was last domiciled.<sup>79</sup>

The Federal courts have no probate jurisdiction, and cannot take proof of wills. When, therefore, a will is duly probated by a State court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in the Federal courts.<sup>80</sup>

<sup>78</sup> In considering the validity of titles by devise, we look to the laws of the State in which the property is situated to ascertain the capacity of the devisor to make and of the devisee to take, and to see that the will is executed, probated, and registered conformably to the requirements of such law. *United States v. Fox*, 94 U. S., 315.

In this case, by a statute of New York a devise of lands in that State can only be made to natural persons, and to such corporations as are created under the laws of the State as are expressly authorized by their charters or by the statute to take by devise.

It was, therefore, held that a devise of lands in that State to the government of the United States was void. See *Kerr v. Moone*, 9 Wheat., 565; *McCormick v. Sulivant*, 10 Wheat., 192; *Inghs v. Sailors' Snug Harbour*, 3 Pet., 99.

By a statute of New York, all estates tail were abolished, and it was declared that if any person should thereafter become seized in fee-tail of any lands, tenements or hereditaments, by virtue of any devise, he should be deemed to have become seized in fee simple absolute, and it was held, following the courts of that State, that this included an estate tail in remainder as well as one in possession. *Van Rensselaer v. Kearney*, 11 How., 297. See further, *Gaines v. Hennen*, 24 How., 553; *Gaines v. New Orleans*, 6 Wall., 642; *Hylton v. Brown*, 1 Wash., 204; *Meade v. Beale, Taney*, 339; *Brine v. Insurance Company*, 96 U. S., 627; *Wilkinson v. Leland*, 2 Pet., 627; *Carpenter v. Pennsylvania*, 17 How., 456; *Corbett v. Nutt*, 10 Wall., 464.

As to State laws governing the right of aliens to take by descent, see *Sullivan v. Burnett*, Sup. Ct. U. S., April 24, 1882, 4 Mor. Trans., 671; *Airhart v. Massieu*, 98 U. S., 491.

As to property of minors, see *Hoyt v. Sprague*, 103 U. S., 613; *Watkins v. Holman*, 16 Pet., 25; *Clark v. Graham*, 6 Wheat., 577.

<sup>79</sup> *Ennis v. Smith*, 14 How., 400; *Wilkins v. Ellett*, 9 Wall., 740; *Harrison v. Nixon*, 9 Pet., 483; *Dixon v. Ramsey*, 3 Cranch, 319; *Harvey v. Richards*, 1 Mason, 381; *Rubber Company v. Goodyear*, 9 Wall., 788.

<sup>80</sup> *Gaines v. New Orleans*, 6 Wall., 642; *Fouvergne v. New Orleans*, 18 How., 470; *Tarver v. Tarver*, 9 Pet., 174; *Langdon v. Goddard*, 2 Story, 267. In *Fuentes v.*

The probate of a will in one State is, as affecting title to lands in another, of no inherent validity whatever,<sup>81</sup> although one State may give efficacy to a will made in another, for the purpose of passing title and the execution of its powers by the executor.<sup>82</sup>

But in the absence of the authority of the laws of another State the

Gaines, 1 Woods's, 112, Mr. Justice Bradley says: "It is true that in the case of *Gaines v. New Orleans*, 6 Wall., 703, it is said: 'When a will is duly probated by a State court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court.' But it was not necessary to decide this point in that case, and whilst the remark is strictly true, with regard to wills of personalty, in nearly every State in the Union, it is not true, with regard to wills of realty, in many States; and I do not suppose it to be true, with regard to wills of either realty or personalty, in Louisiana. If the State courts are not bound by the probate, I do not see why the United States courts should be bound thereby. I am referred to the opinion of this court, delivered in May term, 1870, upon an application of Mrs. Gaines to remove into this court proceedings instituted in the second district court of the parish of Orleans by Fuentes and others, for the revocation of the probate of the will of 1813.

"We then held that we had not probate jurisdiction and could not entertain the questions which were raised in that case. Such is still my opinion. But that is where the direct object of the proceeding is the granting or revocation of probate; not when the validity of a will comes up incidentally on a question of property. The probate of the will is granted for the purpose of administering the estate of the deceased, and confers authority upon the executor to do all things necessary to that end.

"But if the executor of any other person claims, by virtue of the will, property in the possession of a third person, who was not a party to the probate proceedings, and who claimed by a title adverse to the will, such third person is not concluded, as to its validity, by the probate.

"Such I understand to be the laws of Louisiana, and when the validity of the will is brought in question in this incidental way it is open for investigation in any court in which the title of the property may be litigated, whether a State court or a court of the United States."

In the case of *Broderick's Will*, 21 Wall., 503, the court, while holding that a Federal court, sitting in equity, had no jurisdiction to set aside the probate of a will on the ground of fraud, mistake, or forgery, this being within the exclusive jurisdiction of the courts of probate of the State, leave the question open as to what would be done in a case where the parties seeking relief would be able to show that, in consequence of circumstances beyond their control and without their fault, they had no knowledge or information of the alleged testator's death, and of course no knowledge of the forgery of his will until after the period of contesting the will in

<sup>81</sup> *McCormick v. Sulliant*, 10 Wheat., 192.

<sup>82</sup> *Secrest v. Green*, 3 Wall., 744; *Langdon v. Goddard*, 2 Story, 267; *Doe ex dem. Obrien v. Moody*, 4 McLean, 75; *Applegate v. Smith*, 31 Mo., 166.

rights and powers of executors and administrators are restricted to the territory of the State from which their letters emanate.<sup>83</sup>

No State law can take away jurisdiction from the Federal courts in a case proper for its exercise;<sup>84</sup> and it matters not that, by the peculiar structure of a State probate system, a proceeding conformable to equity principles and practice cannot be maintained, still the Federal courts will give relief according to the received principles of equity, if the party seeking it presents a case for equitable relief.<sup>85</sup>

The courts of the United States have jurisdiction over executors and administrators possessing the requisite citizenship. Even in cases of ancillary administration they will enforce the same rules in the adjustment of claims against them that the State courts administer in favor of their own citizens.<sup>86</sup>

the probate court had expired, and when the power of such court to investigate the subject further had ceased.

Held in *Berney v. Droxel*, 12 Fed. Rep., 393, that the decision of the surrogate, as to the competency of a person to serve to whom letters of testamentary were issued, cannot be collaterally attacked. Citing *Canjolle v. Ferrie*, 13 Wall., 465.

See *Southworth v. Adams*, 4 Fed. Rep., 1, where it was held the Circuit Court of the United States might not have had jurisdiction of an action to establish a lost will, yet if the parties were citizens of different States, the case was removable under the act of 1875, and after its removal, the circuit court had jurisdiction of the same.

<sup>83</sup> *Noonan v. Bradley*, 9 Wall., 394; *Kerr v. Moon*, 9 Wheat., 565; *Vaughan v. Northrup*, 15 Pet., 1; *Caldwell v. Harding*, 5 Blatchf., 501; *Mellus v. Thompson*, 1 Cliff., 125. In *Mackey v. Central Railroad*, 14 Blatchf., 65, it is held that an administratrix appointed in New York cannot sue in that State to recover damages for the death of the intestate, which occurred in New Jersey, the right of action being claimed under a statute of New Jersey. S. C., 4 Fed. Rep., 617. See also *Eells v. Holder*, 12 Fed. Rep., 668; citing *Dixon's Executors v. Ramsey's Executors*, 3 Cranch., 319; and *Fenwick v. Sears*, 1 Cranch., 259.

<sup>84</sup> *Suydam v. Broadnax*, 14 Pet., 67; *Watson v. Tarpley*, 18 How., 517.

<sup>85</sup> *Payne v. Hook*, 7 Wall., 425; *Kenedy v. Creswell*, 101 U. S., 641.

When will refuse to order account, proceedings to this end having already been instituted in orphans' court: *Parkes v. Aldridge*, 8 Fed. Rep., 220.

When bill for distribution will not lie: *McDermott v. Copeland*, 9 Fed. Rep., 536.

When pendency of bill in State court will not prevent similar bill in Federal Court: *Logan v. Greenlaw*, 12 Fed. Rep., 10.

<sup>86</sup> *Walker v. Walker*, 9 Wall., 743; *Green v. Creighton*, 23 How., 90; *Harvey v. Richards*, 1 Mason, 381. See also *Payne v. Hook*, 7 Wall., 425.

It is remarked by Mr. Justice Baldwin, in *Harman v. Harman*, 1 Bald., 129: "The

The citizenship which confers the right to sue is not, as we have already noticed, that of the testator or intestate, but of the executor or administrator.<sup>87</sup>

The construction of a will by a State court does not, as in the case of the construction of a State statute, constitute a binding rule of decision for the Federal courts, unless such construction has been so long acquiesced in as to become a rule of property, in which case it will be followed.<sup>88</sup>

In case of the insolvency of an estate, if a State statute places the whole estate, real and personal, within the custody of the probate court so that the assets may be fairly and equally distributed among creditors, without distinction as to whether resident or non-resident; a non-resident creditor may get a judgment in a Federal court against the resident executor or administrator, and come in on the estate, according to the law of the State, for such payment as that law, marshalling the rights creditors, awards to debtors of his class; but he cannot, because he has obtained a judgment in the Federal court, issue execution and take precedence of other creditors who have no right to sue in the Federal courts, and if he does issue execution and sell lands, the sale is void.<sup>89</sup>

plaintiffs come into this court to claim the personal property of a decedent domiciled in this State (Pennsylvania) at the time of his death. He must pursue his remedy by the law of the forum to which he resorts, and comply with all things required to entitle them to distribution, one of which is that he shall give bond and security in the orphans' court to the administrator to refund in certain cases. This court, in a suit in equity between a foreigner and a citizen, praying for an order of distribution of the estate of a decedent, is bound by the same law which regulates the proceedings of the orphans' court of the State. It has accordingly ordered that bonds shall be given pursuant thereto." See also *Tate v. Norton*, 94 U. S., 746; *Kittridge v. Race*, 92 U. S., 116; *Yonley v. Lavender*, 21 Wall., 276.

As to when State laws will not prevent circuit courts of the United States from construing will, ordering account, etc., see *United States v. Gillespie*, 9 Fed. Rep., 74.

State statutes, limiting time in which creditors shall present claims or bring suit, are binding on Federal courts: *Pulliam v. Pulliam*, 10 Fed. Rep., 53.

<sup>87</sup> *Rice v. Houston*, 13 Wall., 66; *Childress v. Emery*, 8 Wheat., 642; *Coal Company v. Blatchford*, 11 Wall., 172; *Amory v. Amory*, 95 U. S., 186.

<sup>88</sup> *Lane v. Vick*, 3 How., 464.

<sup>89</sup> *Yonley v. Lavender*, 21 Wall., 276. See also *Williams v. Benedict*, 8 How.,

§ 68. **State Insolvent Laws.**—With respect to State insolvent laws, it is settled that the insolvent laws of one State cannot discharge the contracts of citizens of other States, because such laws have no extra territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction of the case.<sup>90</sup> But State insolvent acts are valid as to subsequent contracts between citizens or inhabitants of the State enacting the law, and a discharge of the debtor thereunder is as binding upon an alien creditor residing or domiciled in the State at the time when the contract was made and the discharge granted, as it would be upon creditors who were naturalized aliens or native-born citizens residing in the State.<sup>91</sup>

§ 69. **State Laws—Evidence.**—Where the CONSTITUTION, treaties, or statutes of the United States do not otherwise provide, the Federal courts, in civil cases at common law, are bound by the rules of evidence prescribed by State laws, and this, notwithstanding they violate the ancient law of evidence, or are contrary to the rule of the Federal court for the circuit.<sup>92</sup>

107; *Union Bank of Tennessee v. Jolly*, 18 How., 503; *Bank of Tennessee v. Horn*, 17 How., 157; *Suydam v. Broadnax*, 14 Pet., 67.

<sup>90</sup> *Gilman v. Lockwood*, 4 Wall., 409; *Baldwin v. Hale*, 1 Wall., 223; *Baldwin v. Bank of Newbury*, 1 Wall., 234; *Ogden v. Saunders*, 12 Wheat., 213; *Cook v. Moffat*, 2 How., 295; *Suydam v. Broadnax*, 14 Pet., 75; *Worthington v. Jerome*, 5 Blatch., 279.

<sup>91</sup> *Von Glahn v. Varrenne*, 1 Dill., 515, per Dillon, C. J., Mr. Justice Miller and Nelson, J., concurring in result. See also cases cited in notes 74 and 75, *supra*.

The bankrupt act of the United States, while in force, merely suspended the operation of State insolvent laws, and funds in the hands of an assignee appointed by the State court, under State insolvency proceedings, are not subject to attachment by non-resident creditors. *Torrens v. Hammond*, 10 Fed. Rep., 900, reviewing *Crapo v. Kelly*, 16 Wall., 610, and other cases.

In absence of bankrupt law, insolvent debtors may, with certain limitations, prefer one creditor to exclusion of all others. *Smith v. Craft*, 12 Fed. Rep., 856. See on same point, *Bean v. Patterson*, 12 Fed. Rep., 739.

<sup>92</sup> *Ryan v. Bindley*, 1 Wall., 66; *Wright v. Bales*, 2 Black, 535; *Vance v. Campbell*, 1 Black, 427; *Hausknecht v. Claypool*, 1 Black, 431. See also *Potter v. National Bank*, 102 U. S., 163; citing with approval most of the above cases and affirming the doctrine stated in the text.

It matters not that the case is a commercial one, the State law prescribing rules



The reason of the rule is clearly and forcibly set forth by Mr. Chief Justice Taney as follows:

"We do not perceive any sufficient reason for so construing this act of Congress as to exclude from its provisions those statutes of the several States which prescribe rules of evidence in civil cases in trials at common law. Indeed, it would be difficult to make the laws of the State, in relation to the rights of property, the rule of decision in the circuit courts, without associating with them the laws of the same State prescribing the rules of evidence by which the rights of property must be decided. How could the courts of the United States decide whether property had been legally transferred unless they resorted to the laws of the State to ascertain by what evidence the transfer must be established? In some cases the laws of the States require written evidence; in others, it dispenses with it, and permits the party to prove his case by parol testimony; and what rule of evidence could the courts of the United States adopt to decide a question of property, but the rule which the legislature of the State has prescribed? The object of the law of Congress was to make the rules of decisions in the courts of the United States the same with those of the States, taking care to preserve the rights of the United States by the exceptions contained in the section.

"Justice to the citizens of the several States required this to be done, and the natural import of the words used in the act of Congress includes the laws in relation to evidence as well as the laws in relation to property. We think they are both embraced in it."<sup>93</sup>

But where Congress, within the scope of its authority, has legislated specially upon any matter pertaining to evidence, the rules prescribed by it will obtain in the courts of the United States, notwithstanding they contravene State laws, rules, and decisions upon the same subject.<sup>94</sup>

of evidence will be followed by the Federal courts sitting within the State: *Brandon v. Loftus*, 4 How., 127; *Sims v. Hundley*, 6 How., 1. See also *Wilcox v. Hunt*, 13 Pet., 378; *Fowler v. Hecker*, 4 Blatch., 425.

<sup>93</sup> *McNiell v. Holbrook*, 12 Pet., 84.

<sup>94</sup> *Potter v. National Bank*, 102 U. S., 163; *Connecticut Mutual Life Insurance*

The Federal courts take judicial notice of the constitutions and public laws of the several States,<sup>95</sup> and may do so, it seems, of private laws, where the laws of the State so authorize the State courts.<sup>96</sup> With respect not only to the laws, but the judicial decisions, of the

*Company v. Schaefer*, 94 U. S., 457. In the trial of this case, which was a suit upon a policy of life insurance, in the the Circuit Court of the United States for the southern district of Ohio, an exception was taken to the overruling of certain testimony offered by the defendant. The plaintiff, having offered herself as a witness, on her cross-examination, admitted that she had employed one Harris as her attorney to file her petition for divorce; and being questioned whether she had not stated to him, to be embodied in the petition, that Schaefer had been an habitual drunkard for a period of more than three years prior to the date of filing the petition, denied that she had so stated to him. (Had such been the fact, it would have falsified the statement made in the application for insurance.) The defendant called Harris and asked him whether the plaintiff had not so stated to him on that occasion. The question was objected to and overruled as calling for confidential communications between attorney and client. The defendant alleged that herein the court erred, because, by the law of Ohio, such communications are not privileged. The case was carried by error to the Supreme Court of the United States.

Mr. Justice Bradley, speaking for the court, after referring to the provisions of the act of Congress that "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; *provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transac-

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<sup>95</sup> In a case tried in the United States Circuit Court for the district of Maryland, an objection was made that the copy of an original bill of sale, on record in a notary's office in Louisiana, was not evidence, unless the plaintiff accounted for the non-production of the original. The validity of the objection depended upon the construction whether the non-production of the original was sufficiently accounted for. It was not accounted for by any proofs offered by plaintiff, and unless the court could take judicial notice of the laws of Louisiana, it could not say that the non-production of the original was accounted for.

On this point, Mr. Justice Story, delivering the opinion of the court, said: "We are of opinion that the Circuit Court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union in cases to which they respectively apply.

"The judicial power conferred on the general government by the Constitution extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. That jurisprudence is, then, in

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<sup>96</sup> *Beatty v. Knowler*, 4 Pet., 152; *Railroad Company v. Bank of Ashland*, 12 Wall., 226.

several States, nothing is required to be specially averred in pleading which is not required by the State tribunals respectively.<sup>97</sup> They also take judicial notice of the geographical divisions of a State,<sup>98</sup> and of the situation of a city, as of New Orleans, for the purpose of

tion with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. *In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty*" (Revised Statutes, section 858), says:

"The laws of the State are only to be regarded as rules of decision in the courts of the United States, where the Constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling, that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for Congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property, and where Congress has declared the rule, the State law is silent. Now, the competency of parties as witnesses in the Federal courts depends on the act of Congress in that behalf passed in 1864, amended in 1865, and codified in the Revised Statutes, section 858. It is not derived from the statute of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only conditions and qualifications which Congress deemed necessary are expressed in the act of Congress, and the admission in evidence of previous communications to counsel is not one of them." See also *Easton v. Hodges*, 7 Biss., 324; *Johnson v. Donalson*, 3 Fed Rep., 22; *United States v. Hughes*, 12 Blatch., 553; *United States v. Meyres*, 1 Hughes, 533; *Sage v. Tauszky*, 6 Cen. L. J., 7; *Beardsley v. Littell*, 14 Blatch., 102.

By act of Congress, all persons within the jurisdiction of the United States have the same right to give evidence in every State and Territory as is enjoyed by white

no just sense, a foreign jurisprudence, to be proved in the courts of the United States by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts." *Owings v. Hull*, 9 Pet., 607. See also *Railroad Company v. Bank of Ashland*, 12 Wall., 226; *Cheever v. Wilson*, 9 Wall., 108, p. 121; *Griffing v. Gibb*, 2 Black, 519; *Gordon v. Hobart*, 2 Sum., 401; *Woodworth v. Spaffords*, 2 McLean, 168; *Jasper v. Porter*, 2 McLean, 579; *Starr v. Moore*, 3 McLean, 354; *Jones v. Hayes*, 4 McLean, 521; *Mewster v. Spalding*, 6 McLean, 24; *Merrill v. Dawson, Hemsps.*, 563.

As to judicial notice of laws of former governments prevailing in countries acquired by the United States: *United States v. Perot*, 98 U. S., 428; *United States v. Turner*, 11 How., 663; *Fremont v. United States*, 17 How., 542; *City of Brownsville v. Cavazos*, 2 Woods's, 293.

<sup>97</sup> *Pennington v. Gibson*, 16 How., 65, p. 81; cited with approval in *Cheever v. Wilson*, 9 Wall., p. 121. See also *Covington Drawbridge Company v. Shepherd*, 20 How., 227.

<sup>98</sup> *Lyell v. Lapeer County*, 6 McLean, 446; *United States v. Johnson*, 2 Sawy., 482.

determining whether the tide ebbs and flows at its port,<sup>99</sup> and of the distance between well-known geographical points.<sup>100</sup> They likewise take judicial notice of the jurisdiction of State courts,<sup>101</sup> and of the seals of State courts,<sup>102</sup> and of what persons, under the public laws of a State, sustain the proper official character to take depositions under the acts of Congress.<sup>103</sup>

citizens (Revised Statutes, section 1977), and Indians are declared to be competent as witnesses in cases of the violation of the law relating to the sale of liquor in the Indian country. (Revised Statutes, section 2140.)

Testimony given by a witness before either house, or before any committee of either house, of Congress, cannot be used in evidence as any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony, not including within the privilege an official paper or record produced by himself. (Revised Statutes, section 859.) Nor can the pleading of a party, nor any discovery, nor evidence obtained from a party or witness by means of a judicial proceeding in the United States or any foreign country, be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; but such party or witness will not be exempt from prosecution and punishment for perjury committed in discovering or testifying as aforesaid. (Revised Statutes, section 860.) The use of bank checks, etc., in evidence, unless duly stamped, is prohibited. (Revised Statutes, section 3421.)

With respect to the burden of proof, it is declared that "In suits or informations brought where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall be upon such claimant; *provided*, that probable cause is shown for such prosecution, to be judged of by the court." (Revised Statutes, section 909.) And in trials about the right of property, in which an Indian may be a party on one side and a white person on the other, the burden of proof rests upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. (Revised Statutes, section 2126.) The burden of proof is also cast in certain cases of seizure of distilled spirits for violation of the internal revenue laws, upon the claimant, to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with. (Revised Statutes, section 3333.)

In the above, and all other cases in which Congress, within the range of its authority, has seen fit to prescribe a rule of evidence, such rule will be followed without regard to State law and practice.

<sup>99</sup> *Peyroux v. Howard*, 7 Pet., 324.

<sup>100</sup> *Rice v. Montgomery*, 4 Biss., 75. But the court in this case, whilst recognizing the doctrine stated in the text, declined to take judicial notice of how long it would take an express company to carry money from one point to another.

<sup>101</sup> *Mewster v. Spaulding*, 6 McLean, 24.

<sup>102</sup> *Ex Parte Garnett*, 7 Leg. Int., 174.

<sup>103</sup> *Jasper v. Porter*, 2 McLean, 579.

As to presumptions, it may be stated generally that the Federal courts indulge every presumption in support of the proceedings of State courts competent to deal with the subject-matter and the parties.<sup>104</sup>

And where State courts have jurisdiction, as for instance, to authorize the sale of a decedent's estate, the Federal courts presume their proceedings to have been regular.<sup>105</sup>

Unless a State law requires evidence of official character to accompany any of the official acts which it authorizes, none is necessary. It will, for instance, be presumed that a commissioner of deeds in New York, whose authority to act is limited only to his county, exercised his office within the territorial limits for which he was appointed, although the only name given to his certificate of acknowledgment was "State of New York."<sup>106</sup>

**§ 70. State Laws — Limitation of Actions.**—State limitation laws are not binding on the Federal government,<sup>107</sup> but with re-

<sup>104</sup> *Voorhees v. Bank of United States*, 10 Pet., 449; *Chouteau v. United States*, 9 Pet., 147; *Harvey v. Tyler*, 2 Wall., 328; *Ex Parte Watkins*, 3 Pet., 193; *Kemp v. Kennedy*, 5 Cranch, 173; *Lathrop v. Stuart*, 5 McLean, 167; *Sprague v. Litherberry*, 4 McLean, 442; *Gray v. Larrimore*, 2 Abb. U. S., 542; *Kibbe v. Thompson*, 5 Biss., 256.

<sup>105</sup> *Cornett v. Williams*, 20 Wall., 226; *McNitt v. Turner*, 16 Wall., 352; *Florentine v. Barton*, 2 Wall., 210; *Moore v. Greene*, 19 How., 69; *Grignon v. Astor*, 2 How., 319; *Erwin v. Lowery*, 7 How., 172; *Thompson v. Tolmie*, 2 Pet., 157.

<sup>106</sup> *Carpenter v. Dexter*, 8 Wall., 513. The official character of a State officer taking depositions under act of Congress will be presumed: *Jasper v. Porter*, 2 McLean, 579. See also *Ruggles v. Bucknor*, 1 Paine, 358.

<sup>107</sup> *United States v. Thompson*, 98 U. S., 486; citing *United States v. Hoar*, 2 Mason, 311, and *United States v. Williams*, 5 McLean, 133; *Lindsey v. Miller*, 6 Pet., 666; *Gibson v. Chouteau*, 13 Wall., 92.

In *Joy v. Allen*, 2 Wood. & M., 303, Mr. Justice Woodberry said that he had "no doubt that this statute should prevail in proper cases, where a party chooses to rely on it, in admiralty as well as in common-law proceedings, and if not as a technical bar, yet as an equitable defense, showing unreasonable neglect by the complaining party."

We note some of the subjects with reference to which Congress has seen fit to prescribe a bar:

Suits on a marshal's bond must be commenced within six years after the right of action accrues, saving the rights of infants, married women, and insane persons; *provided*, they sue within three years after disabilities are removed. (Revised Stat-

spect to suits in the courts of the United States between ordinary litigants, the limitation laws of the State in which the court is sitting furnish the rule of decision, and where no special provision has been made by Congress to the contrary, the same effect is to be given to them as is given in the State courts.<sup>108</sup>

utes, section 786.) Suits against the sureties on a postmaster's bond must be instituted within three years after the settlement and closing of the account of the postmaster, it thereby appearing that he is indebted to the United States. (Revised Statutes, section 3838.) Suits for the recovery of forfeitures or penalties under the copyright laws must be commenced within two years after the cause of action arises. (Revised Statutes, section 4968.) Suits and proceedings for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive, or in any manner wrongfully collected, must be brought within two years next after cause of action accrued. (Revised Statutes, section 3227.) Suits and prosecutions for penalties and forfeitures, pecuniary or otherwise, accruing under the laws of the United States, except in cases where it is otherwise specially provided, must be commenced within five years from the time when such penalty or forfeiture accrued; *provided*, the person of the offender, or property liable for such penalty or forfeiture, shall, within such period, be found within the United States, so that proper process therefor may be instituted and served against such person or property. (Revised Statutes, section 1047.) Actions for the recovery of

<sup>108</sup> *Lettingwell v. Waren*, 2 Black, 599; *Meeks v. Olpherts*, 100 U. S., 564; *McCluny v. Silliman*, 3 Pet., 270; *Bank of the United States v. Donnelly*, 8 Pet., 361; *Ross v. Duval*, 13 Pet., 45; *McElmoyle v. Cohen*, 13 Pet., 312; *Townsend v. Jemison*, 9 How., 407; *Flowers v. Foreman*, 23 How., 132; *In re Cornwall*, 9 Blatch., 114.

In an action instituted in one State on a judgment obtained in another State, the law of limitations of the State in which the suit is instituted, or *lex fori*, governs. *McElmoyle v. Cohen*, 13 Pet., 312; *Randolph v. King*, 2 Bond, 104. And a State law limiting actions and executions on judgments rendered in State courts will be applied as a rule to judgments obtained in the courts of the United States. *Ross v. Duval*, 13 Pet., 45. See *Christmas v. Russell*, 5 Wall., 290, in which it is held a State statute which enacts that "no action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought therein,"—is unconstitutional and void, as destroying the right of a party to enforce a judgment regularly obtained in another State, and as conflicting, therefore, with the provisions of the Constitution (article 4, section 1), which ordains that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." In this case the court say: "The provision under consideration is not a statute of limitation, as known to the law or the decisions of the courts upon that subject."

The fixed and received construction by the State courts of such statutes is regarded as a part thereof, so far as such construction does not conflict with the CONSTITUTION of the United States.<sup>109</sup>

And the Federal courts go to the extent of reversing their former decisions and following the latest settled adjudications, where the highest judicial tribunals of a State adopt new views as to the proper construction of such statutes.<sup>110</sup>

Where the effect of a law is to deny the right to sue, it will be held

damages for neglect or refusal to prevent the commission of certain wrongs against civil rights must be commenced within one year after the cause of action accrued. (Revised Statutes, sections 1980 and 1981.) Suits for the recovery of premiums, or excess paid in pursuance of prior agreement to purchasers at public sales of government lands, must be commenced within six years next after the sale of such land by the United States. (Revised Statutes, section 2376.) Suits for the recovery of forfeitures and damages for making false claims against the United States must be commenced within six years from the commission of the act. (Revised Statutes, sections 3490, 3494 and 5438.) Suits between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignees, must be brought within two years from the time when such cause of action accrued for or against such assignees. (Revised Statutes, section 5057.) With respect to the suspension of the statute, it is provided that "In all cases where, during the late rebellion, any person could not, by reason of resistance to the execution of the laws of the United States, or of the interruption of the ordinary course of judicial proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action." (Revised Statutes, section 1048.) And with respect to suits and proceedings for causes arising or acts done or committed prior to the general repeal contained in title 74 of the revision, it is provided that they may be commenced and prosecuted within the same time, as if said repeal had not been made. (Revised Statutes, section 5599.)

<sup>109</sup> *Davie v. Briggs*, 97 U. S., 628; *Leffingwell v. Warren*, 2 Black, 599; *Tioga Railroad v. Blossburg and Corning Railroad*, 20 Wall., 137; *Green v. Neal*, 6 Pet., 291; *Mining Company v. Taylor*, 100 U. S., 37.

<sup>110</sup> *Leffingwell v. Warren*, 2 Black, 599; *Tioga Railroad v. Blossburg and Corning Railroad*, 20 Wall., 137; *Green v. Neal*, 6 Pet., 291; *United States v. Morrison*, 4 Pet., 124.

In a recent case, it is held that the construction given by the Supreme Court of a State to a statute of limitations of a State will be followed by the Supreme Court of the United States in a case decided the other way in the Circuit Court before the decision of the State court. *Moores v. National Bank*, Sup. Ct. U. S., March 6, 1882, 3 Mor. Trans., 709.

void; but statutes of limitations operating prospectively do not impair vested rights or the obligation of contracts.<sup>111</sup>

And though an enactment may reduce the time prescribed by the statute in force when the right of action accrued, it is not unconstitutional, provided a reasonable time be given for the commencement of a suit before the bar takes effect.<sup>112</sup>

It has been held in an action for the recovery of land, that the lapse of time limited by such statutes not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder.<sup>113</sup>

It has also been held that a law or ordinance which revives a claim already barred by the statute of limitations, interferes with vested rights, and is unconstitutional.<sup>114</sup>

**§ 71. Decisions of State Courts.**—The rule that the decisions of the highest court of a State is a part of the law of the State, and will generally be accepted and followed as such by the Federal courts, has already been noticed in some of its more important applications, as in the construction of State constitutions and statutes,<sup>115</sup> and in matters affecting titles to land.<sup>116</sup>

Where the highest court of a State has given different constructions to its Constitution and laws at different times, and rights have been acquired under the former construction, the former will be followed and the latter disregarded,<sup>117</sup> though, ordinarily, where there are conflicting decisions, it is the latest decision that will be followed.<sup>118</sup>

<sup>111</sup> *Christmas v. Russell*, 5 Wall., 290.

<sup>112</sup> *Terry v. Anderson*, 95 U. S., 628; citing *Hawkins v. Barney*, 5 Pet., 457; *Jackson v. Lamphire*, 3 Pet., 280; *Sohn v. Waterson*, 17 Wall., 596; *Christmas v. Russell*, 5 Wall., 290; *Sturges v. Crowninshield*, 4 Wheat., 122.

<sup>113</sup> *Leffingwell v. Warren*, 2 Black, 599. See also *Dolton v. Cain*, 14 Wall., 472. As to personal property: *Shelby v. Guy*, 11 Wheat., 361.

<sup>114</sup> *Lockhart v. Horn*, 1 Woods's, 628, Bradley, justice.

<sup>115</sup> See note 24, p. 201, *ante*.

<sup>116</sup> See note 29, p. 203, and section 65, p. 215, *ante*.

<sup>117</sup> See note 16, p. 197, *ante*. See also a valuable article in volume 7, No. 2, *Southern Law Review* (June and July, 1881), p. 215, discussing "The authority in the United States courts of State constructions of the law of municipal bonds."

<sup>118</sup> *Blossburg and Corning Railroad Company v. Tioga Railroad Company*, 5 Blatch., 387. See also note 24, p. 201, *ante*.



Where a State statute constitutes a contract,<sup>119</sup> or where a question arises under a compact between two States,<sup>120</sup> or where it becomes necessary to pass upon the CONSTITUTION, treaties, and laws of the United States, the courts of the United States do not feel themselves bound by State decisions.<sup>121</sup> And wherever the effect of a State decision is to impair the obligation of contracts, it will not be followed.<sup>122</sup>

With respect to contracts and other instruments of a commercial nature, it is said, in a leading case, by the Supreme Court of the United States: "Undoubtedly the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court, but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed."<sup>123</sup> And, in another case, it is held that

<sup>119</sup> *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Bridge Proprietors v. Hoboken Company*, 1 Wall., 116. *Township of Pine Grove v. Talcott*, 19 Wall., 666; *Butz v. Muscatine*, 8 Wall., 575; *Delmas v. Insurance Company*, 14 Wall., 661. See also note 132, p. 101, *ante*.

<sup>120</sup> *Marlatt v. Silk*, 11 Pet., 1.

<sup>121</sup> See note 132, p. 101, *ante*.

<sup>122</sup> *Gelpcke v. Dubuque*, 1 Wall., 175; *Havemeyer v. Iowa County*, 3 Wall., 294; *Mitchell v. Burlington*, 4 Wall., 270; *Kenosha v. Lamson*, 9 Wall., 477; *Delmas v. Insurance Company*, 14 Wall., 661; *Alcott v. Supervisors*, 16 Wall., 678. See also note 16, p. 197, *ante*.

<sup>123</sup> *Swift v. Tyson*, 16 Pet., 1, decided in 1842. This case went up from New York on certificate of division, and involved the question as to whether the holder of a bill of exchange, who had received it before its maturity for a pre-existing debt, was an innocent holder for value, etc.

It has been frequently referred to with approval, in support of the doctrine stated in the text, that on questions of general commercial law, the courts of the United States are not controlled by the decisions of State courts. *Watson v. Tarpley*, 18 How., 517; *Butz v. City of Muscatine*, 8 Wall., 575; *Boyce v. Tabb*, 18 Wall., 546; *Oates v. National Bank*, 100 U. S., 239; *Railroad Company v. National Bank*, 102 U. S., 14. In this last named case, Mr. Justice Harlan, delivering the opinion of the court, concludes as follows:

"To this doctrine, which received the approval of all the members of this court when first announced, we have, as our decisions show, steadily adhered. We perceive no reason for its modification in any degree whatever. We would not infringe upon it, in this case, without disturbing or endangering that stability which is essential to be maintained in the rules of commercial law. The decisions of the New York court, which we are asked to follow in determining the rights of parties under a contract there made, are not in exposition of any legislative enactment of that State. They express the opinion of that court, not as to the rights of parties under any law

where private rights are to be determined by the application of common-law rules alone, State decisions will not be regarded as conclusive.<sup>124</sup>

The construction by a State court of a will,<sup>125</sup> or, it has been held, of a deed,<sup>126</sup> does not constitute a binding rule of decision on the Federal courts, nor are they controlled in cases of equity<sup>127</sup> or of admiralty,<sup>128</sup> by State decisions, though, as before observed, State laws, with respect to rights, are frequently recognized and enforced in such cases in the courts of the United States.<sup>129</sup>

**§ 72. Constitution of the United States—General Observations.**—The CONSTITUTION of the United States is the supreme law of the land, and any act of Congress, or provision of a State Constitution or State law, repugnant to it is void.<sup>130</sup>

local to that State, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one State, or dependent upon local authority, but one arising out of the usage of the commercial world. Suppose a State court, in a case before it, should determine what were the laws of war as applicable to that and similar cases. The Federal courts, sitting in that State, possessing, it must be conceded, equal power with the State court in the determination of such questions, must, upon the theory of counsel for the plaintiff in error, accept the conclusions of the State court as the true interpretation, for that locality, of the laws of war, and as the 'law' of the State, in the sense of the statute which makes the 'laws' of the States rules of decision in trials at common law. We apprehend, however, that no one would go that far in asserting the binding force of State decisions upon the courts of the United States, when the latter are required, in the discharge of their judicial functions, to consider questions of general law, arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions."

<sup>124</sup> *Chicago v. Robbins*, 2 Black, 418.

<sup>125</sup> *Lane v. Vick*, 3 How., 464. Where the construction of a will is to establish a rule of property, it will be followed. *Conway v. Taylor's Executors*, 1 Black, 603, p. 629; *Jackson v. Chew*, 12 Wheat., 153; *Carroll v. Carroll*, 16 How., 275; *Henderson v. Griffin*, 5 Pet., 151; *Meade v. Beale*, Taney, 339.

<sup>126</sup> *Thomas v. Hatch*, 3 Sumn., 170; *Foxcroft v. Mallett*, 4 How., 353.

<sup>127</sup> *Neves v. Scott*, 13 How., 268; *Flagg v. Mann*, 2 Sumn., 486; *Butler v. Douglass*, 3 Fed. Rep., 612. But see *Meade v. Beale*, Taney, 339.

<sup>128</sup> *Mutual Safety Insurance Company v. Cargo*, Olcott, 89.

<sup>129</sup> See note 28, p. 202.

<sup>130</sup> Clause 2, article 6, Constitution. See p. 124, *et seq.*, *ante*. See also notes 127 and 128, p. 100, and note 11, p. 196, *ante*.

But the question whether a law be void for its repugnancy to the CONSTITUTION is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.<sup>131</sup>

And statutes which are constitutional in part only, will be upheld and enforced, so far as they are not in conflict with the CONSTITUTION; provided, the allowed and prohibited parts are severable.<sup>132</sup>

With respect to the rights of persons and of property (and it is in its relations to these that we expect to consider it), the main office of the CONSTITUTION of the United States is to *secure and guarantee*, not to grant, and to this end are some of its most important inhibitions directed.

Some of these apply to the general government and some to the States, but the rule is that the CONSTITUTION, being framed for the government of the Union, its limitations, except where the States are expressly mentioned, will be held to apply to the Federal government only.<sup>133</sup>

**§ 73. Constitution of the United States — Freedom — Citizenship—Suffrage.**—By the Thirteenth Amendment “Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.”

By the Fourteenth Amendment “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” And by the Fifteenth Amendment “The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by

<sup>131</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Ogden v. Saunders*, 12 Wheat., 213; *County of Livingston v. Darlington*, 101 U. S., 407, p. 410.

<sup>132</sup> *Packet Company v. Keokuk*, 95 U. S., 80; *Allen v. Louisiana*, 103 U. S., 80; *Board of Supervisors v. Stanley*, Sup. Ct. U. S., April 3, 1882, 4 Mor. Trans., 543.

<sup>133</sup> *Barron v. Baltimore*, 7 Pet., 243; *Livingston v. Moore*, 7 Pet., 469; *Fox v. Ohio*, 5 How., 410; *Smith v. Maryland*, 18 How., 71; *Pervear v. Commonwealth*, 5 Wall., 475; *Twitchell v. United States*, 7 Wall., 321; *Justices v. Murray*, 9 Wall., 274; *Edwards v. Elliott*, 21 Wall., 532; *United States v. Cruikshank*, 92 U. S., 542, p. 552.

any State, on account of race, color, or previous condition of servitude." Congress is given power to enforce each of these amendments by appropriate legislation. Citizenship by birth and by naturalization has already been considered. The Fifteenth Amendment does not confer the right of suffrage upon any one, but prevents discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.<sup>134</sup>

**§ 74. Constitution of the United States—Immunities of Citizens.**—It is declared in the first section of the Fourteenth Amendment of the CONSTITUTION that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

A person, as we have seen, may be a citizen of the United States without being a citizen of a State.<sup>135</sup> It is the privileges and immunities of citizens of the United States, and not of the State, to which the above amendment refers.<sup>136</sup> In another place the CONSTI-

<sup>134</sup> *United States v. Reese*, 92 U. S., 214. In this case it is said by Mr. Chief Justice Waite, delivering the opinion of the court: "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States or the United States, however, from giving preference in this particular to one citizen of the United States over another, on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another, having the same qualifications, must be. Previous to this amendment there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by appropriate legislation." See also *United States v. Cruikshank*, 92 U. S., 542, p. 555. Held in *Neal v. Delaware*, 103 U. S., 370, that the adoption of the Fifteenth Amendment rendered inoperative a provision in the then existing Constitution of a State whereby the right of suffrage was limited to the white race. See also *Minor v. Happersett*, 21 Wall., 162.

<sup>135</sup> See note 33, p. 205, *ante*. See also *Walker v. Sauvinet*, 92 U. S., 90, where it is held that a trial by jury in suits at common law, pending in the State courts, is not a privilege or immunity of natural citizenship, which the States are forbidden by the Fourteenth Amendment to abridge; and authorities cited in note 30, p. 204, *ante*.

<sup>136</sup> See note 135, *supra*.

TUTION declares "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."<sup>137</sup>

The one secures to *the citizen of the United States* the enjoyment of the privileges and immunities which belong to him as such, free from any abridgement by State authority. The other secures to *the citizen of the State*, without discrimination, the privileges and immunities of citizens in the several States.

Referring to the provision touching the latter, it is said: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures, to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the CONSTITUTION has tended so strongly to constitute the citizens of the United States one people as this.

"Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

"But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other

<sup>137</sup> Constitution, section 2, article 4.

States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given."<sup>138</sup>

The protection designed by the clause under consideration has no application to a citizen of the State whose laws are complained of,<sup>139</sup> nor to a corporation which, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created.<sup>140</sup>

**§ 75. Constitution of the United States—Due Process of Law—Equal Protection of the Laws.**—The inhibitions of the Fourteenth Amendment, as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," are directed to *State action*, and that alone.<sup>141</sup> It has been said concerning the character of this action: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws.

"Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of

<sup>138</sup> Paul v. Virginia, 8 Wall., 168. See also Guy v. Baltimore, 100 U. S., 434; Ward v. Maryland, 12 Wall., 418; Slaughter House Case, 16 Wall., 36; Live Stock Association v. Crescent City, 1 Abb. U. S., 388; Scott v. Sandford, 19 How., 393, p. 580; Williams v. Bruffy, 96 U. S., 176, p. 183; Woodruff v. Parham, 8 Wall., 123; *Ex Parte Thornton*, 13 Fed. Rep., 538, and note at end of case.

<sup>139</sup> Bradwell v. State, 16 Wall., 130.

<sup>140</sup> Paul v. Virginia, 8 Wall., 168; Insurance Company v. Morse, 20 Wall., 445; Railroad v. Whitton, 13 Wall., 270; Doyle v. Insurance Company, 94 U. S., 535; Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S., 1, p. 12.

<sup>141</sup> Virginia v. Rives, 100 U. S., 313; Strauder v. West Virginia, 100 U. S., 303. Where an act of Congress is directed exclusively against the action of individuals, and not of the States, the law is broader than the constitutional amendments by which it is attempted to be justified, and is without constitutional warrant. Per Mr. Justice Woods, holding section 5519, Revised Statutes, void; 12 Fed. Rep., 577.

law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning."<sup>142</sup>

The difficulty of giving an authoritative definition of what it is for a State to deprive a person of life, liberty, or property without due process of law, which can safely be applied to all cases, is admitted by the courts.

In a case where an assessment of real estate in New Orleans, for draining the swamps of that city, was resisted in the State courts, upon the ground that the proceeding deprived the owner of his property without due process of law, the court lay down the following proposition: "That whenever, by the laws a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."<sup>143</sup>

<sup>142</sup> *Neal v. Delaware*, 103 U. S., 370, quoting, on p. 397, from *Ex Parte Virginia*, 190 U. S., 339.

<sup>143</sup> *Davidson v. New Orleans*, 96 U. S., 97. Held in *Railroad Company v. Richmond*, 96 U. S., 521, that an ordinance of the city council to the effect that the Richmond, Fredericksburg and Potomac Railroad Company should not propel its cars by steam on a certain street did not deprive the company of its property without due process of law. Held in *McMillen v. Anderson*, 95 U. S., 37, that a person is not deprived of property without due process of law by the revenue laws of a State, although they do not provide that a person shall have an opportunity to be present when a tax is assessed against him, or that the tax shall be collected by suit, and that a statute which gives a person, against whom taxes are assessed, a right to enjoin their collection and have their validity judicially determined, is due process of law, notwithstanding he is required, as in other injunction cases, to give security in advance. See also *Pearson v. Yewdall*, 95 U. S., 294; *County of San Mateo v. Southern Pacific Railroad Company*, 13 Fed. Rep., 145.

With respect to judicial proceedings, it is held that service by publication, as affording jurisdiction to determine the personal rights and obligations of non-resident parties, does not constitute due process of law.<sup>144</sup>

The Fifth Amendment of the CONSTITUTION contains an inhibition against Federal action similar to that contained in the Fourteenth Amendment against State action. It provides, amongst other things, that no person shall be deprived of life, liberty, or property without due process of law, and the construction placed upon the words, as there employed, accords substantially with that placed upon the same words in the Fourteenth Amendment.<sup>145</sup>

As to the equality clause, it is not designed to secure all persons the benefit of the same laws and same remedies. Great diversities must exist in these matters. It has reference to persons and classes of persons, and means that no person or classes of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under the like circumstances.<sup>146</sup>

In *Munn v. Illinois*, 94 U. S., 113, it was held that an act of the General Assembly of Illinois, regulating public warehouses, etc., was not repugnant to the provision of the Fourteenth Amendment against depriving an owner of his property without due process of law. This case contains an interesting discussion of the effect of the Fourteenth Amendment on the power of the States to regulate the conduct of their citizens and of the manner in which they shall use their property. See also *Railroad Company v. Iowa*, 94 U. S., 155; *Peik v. Railroad Company*, 94 U. S., 164; *Railroad Company v. Blake*, 94 U. S., 180; *Kennard v. Louisiana*, 92 U. S., 480; *Greene v. James*, 2 Curtis, 187. See note 134, p. 101, *ante*.

A person imprisoned under a valid law, although there is error in the proceeding resulting in the commitment, is not imprisoned without due process of law, contrary to the Fourteenth Amendment. *In re Ah Lee*, 6 Sawy., 410.

<sup>144</sup> *Pennoyer v. Neff*, 95 U. S., 714. See also note 160, p. 108, *ante*, and note 134, p. 101, *ante*.

<sup>145</sup> *Springer v. United States*, 102 U. S., 586. See *Davidson v. New Orleans*, 96 U. S., 97, where the comments on "due process of law," as used in the Fifth Amendment, made by court in *Murray's Lessee v. Hoboken Land and Improvement Company*, 18 How., 272, are reviewed. See also *In re Meador*, 1 Abb. U. S., 317; *Twitchell v. Commonwealth*, 7 Wall., 321.

<sup>146</sup> *Missouri v. Lewis*, 101 U. S., 22; *County of San Mateo v. Southern Pacific Railroad Company*, 13 Fed. Rep., 145.



A colored citizen, a party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, a mixed jury not being, within the CONSTITUTION, always or absolutely necessary to the equal protection of the laws; still it is a right to which he is entitled, that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color.<sup>147</sup>

**§ 76. Constitution of the United States—Bills of Attainder—Ex Post Facto Laws.**—The CONSTITUTION inhibits the passage, either by Congress or by the States, of any bill of attainder or *ex post facto* law.<sup>148</sup>

Within the meaning of the CONSTITUTION, bills of attainder include bills of pains and penalties, and its prohibitions were intended to secure the right of the citizen against deprivation for past conduct, by legislative enactment under any form, however disguised.<sup>149</sup>

<sup>147</sup> *Neal v. Delaware*, 103 U. S., 370. Held by Sawyer, C. J., that the statute of California making it an offense to disinter or remove from the place of burial the remains of any deceased person without a permit, etc., did not conflict with that provision of the Fourteenth Amendment which prohibited any State from denying to any person within its jurisdiction the equal protection of the laws. *In re Wong Quoy*, 2 Fed. Rep., 624; S. C., 6 Sawy., 237.

In *Parrott's Chinese Case*, 6 Sawy., 349 (S. C., 1 Fed. Rep., 481), it is held that a provision of the Constitution of California, and an act of the Legislature of that State passed in pursuance thereof, prohibiting the employment of Chinese as laborers, etc., is in conflict with the Fourteenth Amendment with respect both to the inhibition against depriving a person of life, liberty, and property without due process of law, and of the equal protection of the laws.

And upon the like grounds, a statute of the same State, which prohibited all aliens, incapable of becoming electors of the State, from fishing in the waters of the State, was held to be void. *In re Ah Chong*, 6 Sawy., 451; S. C., 2 Fed. Rep., 733. See also *In re Quong Woo*, 13 Fed. Rep., 229.

<sup>148</sup> Clause 3 of section 9, and clause 1 of section 10, of article 1.

<sup>149</sup> "A bill of attainder," it is said, "is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings v. State of Missouri*, 4 Wall., 277. The Missouri Constitution of 1865 required priests and clergymen, in order that they might continue in the exercise of their professions and be allowed to teach and preach, to take and subscribe an oath that they had not committed certain desig-

Whilst it has been settled that the expression "*ex post facto laws*" is to be understood in a restricted sense, relating to criminal cases only,<sup>150</sup> still the constitutional prohibition cannot be evaded by giving a civil form to that which is in substance criminal.<sup>151</sup> The CONSTITUTION does not prohibit the legislature of a State or Territory from exercising judicial functions, nor from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract.<sup>152</sup>

**§ 77. Constitution of the United States — Trial by Jury.**—It is provided in the CONSTITUTION, as originally adopted,

nated acts, some of which were at the time offenses with heavy penalties attached, and some of which were at the time acts innocent in themselves. This oath was styled the "oath of loyalty," and was designed to exclude from all participation in governmental affairs persons who had sympathized with the Southern Confederacy. After the adoption of the Constitution, Rev. Mr. Cummings, a priest of the Roman Catholic Church, was indicted, convicted of teaching and preaching as a priest, and sentenced to pay a fine of \$500, and to be committed to jail until said fine and costs were paid.

On appeal to the Supreme Court of Missouri the judgment was affirmed and the case carried to the Supreme Court of the United States, under the twenty-fifth section of the Judiciary Act. It was there held that this provision of the Missouri Constitution was repugnant to the Constitution of the United States, and void; that the prohibition of the Constitution of the United States against passing bills of attainder was intended to secure the right of the citizen against deprivation for past conduct, by legislative enactment under any form, however disguised.

In *Ex Parte Garland*, 4 Wall., 333, it is held that exclusion from the practice of the law in the Federal courts, or from any of the ordinary occupations of life, for *past conduct*, is punishment for such conduct, and violates the inhibition against the passage of bills of attainder. See also *Pierce v. Carskadon*, 16 Wall., 234.

<sup>150</sup> *Carpenter v. Pennsylvania*, 17 How., 456; *Calder v. Bull*, 3 Dall., 386; *Fletcher v. Peck*, 6 Cranch, 87; *Watson v. Mercer*, 8 Pet., 88. An *ex post facto* law is defined to be one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required. *Cummings v. State of Missouri*, 4 Wall., 277; *Pierce v. Carskadon*, 16 Wall., 234.

An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission. *Gut v. State*, 9 Wall., 35.

<sup>151</sup> *Cummings v. State of Missouri*, 4 Wall., 277; *Ex Parte Garland*, 4 Wall., 333; *Pierce v. Carskadon*, 16 Wall., 234; *Burgess v. Salmon*, 97 U. S., 381.

<sup>152</sup> *Randall v. Kreiger*, 23 Wall., 137; *Satterlee v. Matthewson*, 2 Pet., 380; *Watson v. Mercer*, 8 Pet., 88; *Drehman v. Stiffe*, 8 Wall., 595; *Baltimore and S. R. R. Co. v. Nesbit*, 10 How., 395.

that "The trial of all crimes, except in cases of impeachment, shall be by jury."<sup>153</sup> By the Sixth Amendment it is declared: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." And by the Seventh Amendment, that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." These several provisions apply solely to the courts of the United States, the States being left to regulate trials in their own courts in their own way.<sup>154</sup> The constitutional right of trial by jury was intended as well for a state of war as of peace, and is binding upon rulers and people at all times and under all circumstances.<sup>155</sup> "The Seventh Amendment," says Mr. Justice Story, "may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."<sup>156</sup>

<sup>153</sup> Article 3, section 2, clause 3.

<sup>154</sup> So held, with respect to the Seventh Amendment, in *Pearson v. Yewdall*, 95 U. S., 294; *Walker v. Sauvinet*, 92 U. S., 90; *Edwards v. Elliott*, 21 Wall., 532. And so held as to Sixth Amendment. *Twitchell v. Commonwealth*, 7 Wall., 321. See also *Fox v. Ohio*, 5 How., 410; *Smith v. Maryland*, 18 How., 71; *Withers v. Buckley*, 20 How., 84.

<sup>155</sup> *Ex Parte Milligan*, 4 Wall., 2. Held in *Webster v. Reid*, 11 How., 437, that an act of the Legislature of the Territory of Ohio, directing certain civil actions, founded on contract, to be decided without the intervention of a jury, was contrary to the Constitution of the United States.

In *Lewis v. Cocks*, 23 Wall., 466, referring to the distinction between law and equity, and to the statutory inhibition against the maintenance of any suit in equity where there was a plain, adequate and complete remedy at law, it is said: "It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury;" citing *Hipp v. Babin*, 19 How., 278. See note 26, p. 28, *ante*; and *Spring v. Domestic Sewing Machine Company*, 13 Fed. Rep., 446, and *Dumont v. Fry*, 12 Fed. Rep., 21.

<sup>156</sup> *Parsons v. Bedford*, 3 Pet., 433. It is held in *Raymond v. Danbury and Norwalk Railroad Company*, 14 Blatch., 133, that in an action of tort, where the defend-

The right of trial by jury may be waived by the parties in civil cases, and the judgment of the court in such cases will be valid.<sup>157</sup> But in criminal cases, it is a right which cannot be waived, and a trial by the

ant suffers a default, the plaintiff has no constitutional right to have the damages assessed by a jury; that such assessment is a matter of practice, and may be made according to the practice of the courts of the State in which the Federal court is held.

In *Bank of Hamilton v. Dudley*, 2 Pet., 492, it was held that the occupant claimant law of Ohio, which authorized the court in a suit at law to appoint commissioners to value the improvements, was not binding on the Federal courts in causes tried therein, because repugnant to the Seventh Amendment of the Constitution; that the proceeding for improvements was a suit at common law and should be submitted to a jury.

In *Miller v. United States*, 11 Wall., 268, which was a case to confiscate railroad stock under acts of Congress of August 6, 1861, and July 17, 1862, the court say: "The third assignment is that, as the proceedings related to seizure on land, the case was one of common-law jurisdiction, and there should have been a trial by jury, and we are referred to *Union Insurance Company v. United States*, 6 Wall., 759; *Armstrong's Foundry*, 6 Wall., 766, and other kindred cases. But in this cause there was a default. After the default, there was no fact to be ascertained. The province of a jury in suits at common law is to decide issues of fact. When there are no such issues, there can be nothing for a jury to try. This assignment is, therefore, without merit. None of the cases cited go further than to hold that issues of fact, on the demand of either party, must be tried by a jury." See *United States v. Winchester*, 99 U. S., 372.

The following were held to be admiralty causes, in which a jury was not required: *United States v. La Vengeance*, 3 Dall., 297; *United States v. Betsey*, 4 Cranch, 443; *Whelan v. United States*, 7 Cranch, 112; *The Eagle*, 8 Wall., 15. See also *Waring v. Clarke*, 5 How., 441; *The Sarah*, 8 Wheat., 391; *The Margaret*, 9 Wheat., 421; *Clarke v. United States*, 2 Wash., 519.

As to equity cases, see *Ely v. Monson, etc., Manufacturing Company*, 4 Fish. Pat. Cas., 64; *Woodworth v. Rogers*, 3 Wood. and M., 135.

The circuit court has no power to order a peremptory non-suit against the will of the plaintiff. *Elmore v. Grymes*, 1 Pet., 469; *D'Wolf v. Rabaud*, 1 Pet., 476; *Crane v. Morris*, 6 Pet., 598; *Thompson v. Campbell, Hems*, 8. Though the suit be peculiar and not according to the course of the "common law," as in the case of proceedings in the courts of Louisiana. *Merryfield v. Jones*, 2 Curtis, p. 306; *Hiriart v. Ballon*, 9 Pet., 156; *Gwin v. Breedlove*, 2 How., 29; *Gwin v. Barton*, 6 How., 7; *Bein v. Heath*, 12 How., 168.

<sup>157</sup> *Kearney's Case*, 12 Wall., 275; *Bank of Columbia v. Oakly*, 4 Wheat., 235; *Hiriart v. Ballon*, 9 Pet., 156; *Parsons v. Armor*, 3 Pet., 413; *Guild v. Frontin*, 18 How., 135; *Snydam v. Williamson*, 20 How., 427; *Kelsey v. Forsyth*, 21 How., 85; *Campbell v. Boyreau*, 21 How., 223; *Burr v. Des Moines Company*, 1 Wall., 99; *United States v. Rathborn*, 2 Paine, 578; *Phillips v. Moore*, 100 U. S., 208. But it is not competent for a circuit court to determine, without the intervention of a jury,

court without a jury, even with the consent of the accused, is erroneous.<sup>158</sup>

**§ 78. Constitution of the United States—Habeas Corpus—Bail—Cruel Punishments—Searches and Seizures.**—The inhibition that "The privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it," is one of the greatest guaranties afforded by the Constitution for the security of personal liberty.<sup>159</sup>

The suspension of the privilege of the writ does not suspend the writ itself. The writ issues, as a matter of course, and on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it.<sup>160</sup>

an issue of fact in the absence of the counsel of the party, and without any written agreement to waive a trial by jury. *Morgan's Executor v. Gay*, 19 Wall., 81. See also *Howe Machine Company v. Edwards*, 7 Reporter, 420; *Bonaparte v. Camden and Amboy Railroad Company*, Baldwin, 205.

<sup>158</sup> *United States v. Taylor*, 11 Fed. Rep., 470.

<sup>159</sup> Article 1, section 9, clause 2; 2 Story's Const., section 1388, *et seq.* See notes 335, p. 174, and 270, p. 149.

<sup>160</sup> *Ex Parte Milligan*, 4 Wall., 2. "Martial law," say the court in this case, "can not arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." (P. 127.) It is also said in the same case, referring to the fact that the Constitution goes no further than merely to authorize a suspension of the privilege: "It does not say after a writ of *habeas corpus* is denied a citizen that he shall be tried otherwise than by the course of the common law. If it had intended this result, it was easy, by the use of direct words, to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preservation. Happily it is not so." (P. 126.) See also *Milligan v. Hovey*, 3 Biss., 1; *In re Bogart*, 2 Sawy., 396; *In re Murphy*, Woolw., 141; *Ex Parte Vallandigham*, 1 Wall., 243, citing *Martin v. Mott*, 12 Wheat., 19, and *Dynes v. Hoover*, 20 How., 65; *Tarble's Case*, 13 Wall., 397; *Ex Parte Yerger*, 8 Wall., 85; *Ex Parte John Merryman*, Taney, 246; *McCall v. McDowell*, 1 Abb. U. S., 212; *Ex Parte Field*, 5 Blatch., 63; *McCall v. McDowell*, Dady, 233.

The CONSTITUTION also provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>161</sup>

This applies to the general government, and not to the States.<sup>162</sup> It is a violation of the constitutional guaranty to require larger bail than the prisoner, from his circumstances, could be reasonably expected to give.<sup>163</sup>

The clause in relation to excessive fines, addressed, as it is, to the courts of the United States, is doubtless mandatory to, and a limit upon, their discretion.<sup>164</sup>

It is further provided in the CONSTITUTION that "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."<sup>165</sup> This refers only to process issued under the authority of the United States.<sup>166</sup> It does not prevent the issuance of a distress warrant against a defaulting collector when authorized by act of Congress, and it has no reference to civil proceedings for the recovery of debts of which a search warrant is not made a part.<sup>167</sup>

**§ 79. Constitution of the United States—Rights of Accused—Indictment—Jeopardy—Witness against One's Self—Nature of Accusation—Confronting Witnesses—Process for Obtaining Witnesses—Aid of Counsel.**—In addition to the constitutional guaranties of the right of trial by jury, the privi-

<sup>161</sup> Article 8 of amendments; 2 Story's Const., section 1903; Cooley's Const. Lim. (4 Ed.), 381, 406, 408.

<sup>162</sup> *Pervear v. Commonwealth*, 5 Wall., 475.

<sup>163</sup> *United States v. Brawner*, 7 Fed. Rep., 86.

<sup>164</sup> *Ex Parte Tobias Watkins*, 7 Pet., 568.

<sup>165</sup> Constitution, article 4 of amendments; 2 Story's Const., sections 1901, 1902; Cooley's Const. Lim. (4 Ed.), 367, *et seq.*

<sup>166</sup> *Smith v. Maryland*, 18 How., 71; *United States v. Cruikshank*, 92 U. S., 542, p. 552.

<sup>167</sup> *Murray v. Hoboken Land and Improvement Company*, 18 How., 272. See also *Springer v. United States*, 102 U. S., 586; *Henderson's Distilled Spirits*, 14 Wall., 44.

lege of the writ of *habeas corpus*, and the inhibitions against bills of attainder, *ex post facto* laws, unreasonable seizures and searches, excessive bail, unusual punishments, deprivation of life, liberty or property without due process of law, and the denial of equal protection of the laws, all of which we have noticed, there remain to be considered some other important secureties afforded by the CONSTITUTION to those charged with crime in the courts of the United States.

Amongst them is the provision that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself."<sup>168</sup>

And that the accused shall have the right "to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."<sup>169</sup>

These, as before observed, were not designed as limits upon the State governments in reference to their own citizens, but exclusively as restrictions upon Federal power.<sup>170</sup>

As to what is an "infamous crime," within the meaning of the CONSTITUTION, seems not as yet to have been settled by the Supreme Court of the United States, and the decisions upon the circuit are not agreed.<sup>171</sup> Cases arising in the land or naval forces are expressly excepted from the operation of the Fifth Amendment. The limitation

<sup>168</sup> Article 5 of amendments.

<sup>169</sup> Article 6 of amendments.

<sup>170</sup> See note 154, p. 243, *ante*; *Twitchell v. Commonwealth*, 7 Wall., 321.

<sup>171</sup> *United States v. Petit*, 11 Fed. Rep., 58; *United States v. Yates*, 6 Fed. Rep., 861; *United States v. Baugh*, 1 Fed. Rep., 784; *United States v. Shepard*, 1 Abb. U. S., 431; *United States v. Ebert*, 1 Cen. L. J., 205; *United States v. Maxwell*, 3 Dill., 275; *United States v. Waller*, 1 Sawy., 701; *United States v. Block*, 4 Sawy., 211.

as to "actual service in time of war or public danger" relates only to the militia.<sup>172</sup>

As to jeopardy, the following emphatic language is used: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."<sup>173</sup>

And with respect to confronting the accused with the witnesses against him, Mr. Chief Justice Waite, in *Reynolds v. United States*,<sup>174</sup> speaking for the court, says: "The CONSTITUTION gives the accused the right to a trial, at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The CONSTITUTION does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him, but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is no condition to assert that his constitutional rights have been violated."<sup>175</sup>

<sup>172</sup> Citing *Dynes v. Hoover*, 20 How., 65.

<sup>173</sup> *Ex Parte Lange*, 18 Wall., 163, p. 168, quoted with approval in *United States v. Chouteau*, 102 U. S., pp. 611 and 612. See also *Fox v. Ohio*, 5 How., 410; *United States v. Perez*, 9 Wheat., 579; *United States v. Gibert*, 2 Sumn., 19; *United States v. Shoemaker*, 2 McLean, 114; *United States v. Taylor*, 11 Fed. Rep., 470, p. 475, and note; *United States v. Williams*, 1 Cliff., 5, p. 17; *United States v. Haskell*, 4 Wash., 402.

<sup>174</sup> 98 U. S., 145, p. 158.

<sup>175</sup> See also on this subject *United States v. Angell*, 11 Fed. Rep., 34, in which it is said by (Clark, D. J.: "And I think the law must be held to be that when the wit-



§ 80. Constitution of the the United States—Obligation of Contracts.—As affecting private rights, few provisions in the CONSTITUTION are practically more important, and perhaps none has been so frequently considered, as that which inhibits the States from passing any law impairing the obligation of contracts.<sup>176</sup> It extends to State constitutions and ordinances of State conventions, as well as to State legislative enactments.<sup>177</sup> It does not, however, apply to States before the CONSTITUTION became operative therein.<sup>178</sup> It

ness is living he must be produced, or his testimony cannot be received in criminal cases, even if he be beyond the jurisdiction of the court or of all the United States. The Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, and this without exception. Not if they can be produced, nor if they be within the jurisdiction, but absolutely and on all occasions. And if the accused has this right, it must be mutual and exist on the part of the government. The trial would not be a fair one otherwise. Nor can it fairly be maintained, if the witness has once been confronted with the accused before the committing magistrate, that the requirements or guaranties of the Constitution are answered."

<sup>176</sup> Article 1, section 10, 2 Story's Const., chapter 34, section 1374, *et seq.*; Cooley's Const. Lim. (4 Ed.), 333, *et seq.*; Wade on Retroactive Laws, chapters 3 and 4; Sedgwick on Const. and Stat. Cons. (2 Ed.), 580, *et seq.*

<sup>177</sup> See notes 127, 128 and 129, p. 100, *ante.*; and Marsh v. Burroughs, 1 Woods's, 463; Pacific Railroad Company v. Maguire, 20 Wall., 36; Sawyer v. Parish of Concordia, 12 Fed. Rep., 754, and note at end of case; Railroad Company v. McClure, 10 Wall., 511; Gunn v. Barry, 15 Wall., 610.

<sup>178</sup> Held in Owings v. Speed, 5 Wheat., 420, that an act passed by the Legislature of Virginia before the Constitution of the United States commenced its operation, and operating upon rights of property vested before that time, was not subject to the inhibition against passing laws impairing the obligation of contracts. See Scott v. Jones, 5 How., 343, p. 377, where the above case is referred to.

In the case of League v. De Young, 11 How., 185, it is said upon this subject: "The Constitution of the United States was made by, and for the protection of, the people of the United States. The restraints imposed by that instrument upon the legislative powers of the several States could affect them only after they became States of the Union, under the provisions of the Constitution, and had consented to be bound by it. It surely needs no argument to show that the validity of the legislation of a foreign state cannot be tested by the Constitution of the United States, or that the twenty-fifth section of the Judiciary Act confers no power on this court to annul their laws, however unjust, or tyrannical. How far the people of the State of Texas are bound to acknowledge contracts or titles repudiated by the late Republic, is a question to be decided by their own tribunals, and with which this court has no right to interfere under any power granted to them by the Constitution and acts of Congress."

In Herman v. Phalen, 14 How., 79, Mr. Chief Justice Taney, speaking for the

is designed to protect executory as well as executed contracts,<sup>179</sup> and embraces not only agreements of a private character, but compacts between States,<sup>180</sup> and contracts made by legislative grant or act.<sup>181</sup> And it not only prohibits a State from *passing* a law impairing the obligation of contracts, but forbids a State from *enforcing*, as a law, an enactment of that character, from whatever source originating.<sup>182</sup> Whether a State law impairs the obligation of a contract, is a question upon which the Supreme Court of the United States, as we have seen, will be governed by its own views, unfettered by State adjudications.<sup>183</sup>

What is the obligation of a contract? Mr. Chief Justice Marshall thus answers the question: "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obli-

court, says: "Upon reviewing the opinion in *League v. De Young and Brown*, we see no reason for changing it in any respect."

<sup>179</sup> "A contract," says Mr. Chief Justice Marshall, in the great case of *Fletcher v. Peck*, 6 Cranch, 87, "is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of the contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. *A contract executed, as well as one which is executory, contains obligations binding on the parties.*"

See, to same effect, *Green v. Biddle*, 8 Wheat., 1, where the above definition of a contract is referred to with approval.

<sup>180</sup> *Green v. Biddle*, 8 Wheat., 1; *Hawkins v. Barney*, 5 Pet., 457.

<sup>181</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat., 518. The first of these cases was a grant of land, the second involved the franchise of an eleemosynary corporation; the one protects private rights of property created and vested by virtue of a statute, and the other recognizes the charters of private corporations as contracts.

A contract between a State and a private individual is within the provision of the Constitution: *Hall v. Wisconsin*, 103 U. S., 5. Corporations are also included: *Wolff v. New Orleans*, 103 U. S., 358; *Von Hoffman v. Quincy*, 4 Wall., 535; *Town of Pawlett v. Clark*, 9 Cranch, 292; *Railroad Company v. Pennsylvania*, 15 Wall., 300; *Railroad Company v. Georgia*, 98 U. S., 359.

<sup>182</sup> *Williams v. Bruffy*, 96 U. S., 176.

<sup>183</sup> See note 132, p. 101, *ante*. See also *Hall v. Wisconsin*, 103 U. S., 5; citing (p. 8), with approval, *Township of Pine Grove v. Talcott*, 19 Wall., 666.

gation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day, and this is its obligation."<sup>184</sup>

The obligation of a contract includes everything within its obligatory scope.<sup>185</sup> And it is the settled doctrine of the Supreme Court of the United States that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms; and this rule embraces alike those which affect its validity, construction, discharge and enforcement.<sup>186</sup>

The remedy for the enforcement of a contract may be changed, if the obligation of the contract be not altered;<sup>187</sup> but legislation which

<sup>184</sup> *Sturges v. Crowninshield*, 4 Wheat., 122. In *Edwards v. Kearzey*, 96 U. S., 595, Mr. Justice Swayne, referring to the constitutional provision, says: "A contract is the agreement of minds upon a sufficient consideration that something specified shall be done or shall not be done. The lexical definition of *impair* is 'to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power, to weaken, to enfeeble, to deteriorate.' (Webster's Dictionary.) 'Obligation' is defined to be 'the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract,' etc. (*Id.*) The word is derived from the Latin word *obligatio*, tying up, and that from the verb *obligo*, to bind or tie up; to engage by the ties of a promise or oath, or form of law; and *obligo* is compounded of the verb *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning." Citing *Blair v. Williams* and *Lapsley v. Brashears*, 4 Litt. (Ky.), 65.

<sup>185</sup> *Edwards v. Kearzey*, 96 U. S., 595, p. 600.

<sup>186</sup> *Edwards v. Kearzey*, 96 U. S., 595, p. 601; citing *Von Hoffman v. City of Quincy*, 4 Wall., 535; and *McCracken v. Hayward*, 2 How., 608.

<sup>187</sup> *Railroad Company v. Tennessee*, 101 U. S., 337. In this case it was held that the right to sue, which the State of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, and that the obligation of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States by, taking away what was thus given. Affirmed, and same doctrine announced in *Railroad Company v. Alabama*, 101 U. S., 832. It is held in *Tennessee v. Sneed*, 96 U. S., 69, that the legislature of a State does not impair the obligation of a contract by enlarging, limiting or altering the modes of proceeding for enforcing it, provided that the remedy be not withheld, nor embarrassed with conditions and restrictions which seriously impair the value of the right. See *Sturges v. Crowninshield*, 4 Wheat., 122; *Mason v. Haile*, 12 Wheat., 370; *Bronson v. Kinzie*, 1 How., 311. Held in *Railroad Co. v. Hecht*, 95 U. S., 168, that a statute which prescribes a mode of serving process upon railroad companies different

lessens the efficacy of the remedy, which the law in force at the time a contract was made provided for enforcing it, impairs its obligation.<sup>188</sup>

And when it is the effect of judicial decisions, giving a new construction to a statute, to take away remedies which existed at the time a contract was made, the obligation of the contract is impaired.<sup>189</sup>

One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the CONSTITUTION, to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation; dispensing with any part of its force.<sup>190</sup>

The contracts which the CONSTITUTION protects are those which relate to property rights, not governmental, nor to the exercise of State police power. And where the public health and the public morals require it, legislative action will be upheld, notwithstanding the incidental inconvenience which may ensue to individuals or corporations.<sup>191</sup> But a State may disable itself by contract from exercis-

from that provided for in a charter previously granted to a particular company does not impair the obligation of the contract between such company and the State, and that the power of a State to regulate the forms of administering justice is an incident of sovereignty, and its surrender is never to be presumed. See *Cooley's Const. Lim.* (4 Ed.) 351-354.

<sup>188</sup> *Louisiana v. New Orleans*, 102 U. S., 203. "The obligation of a contract," say the court in this case, "in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." See also *Walker v. Whitehead*, 16 Wall., 314; *Edwards v. Kearzey*, 96 U. S., 595; *Green v. Biddle*, 8 Wheat., 1; *Bronson v. Kinzie*, 1 How., 311; *Curran v. Arkansas*, 15 How., 304; *Gunn v. Barry*, 15 Wall., 610; *White v. Hart*, 13 Wall., 646.

<sup>189</sup> *Butz v. City of Muscatine*, 8 Wall., 575; *Olcott v. Supervisors*, 16 Wall., 678; *Chicago v. Selden*, 9 Wall., 50; *City v. Lamson*, 9 Wall., 477.

<sup>190</sup> *Planters' Bank v. Sharp*, 6 How., 301; *Von Hoffman v. City of Quincy*, 4 Wall., 535.

<sup>191</sup> *Stone v. Mississippi*, 101 U. S., 814; *Beer Company v. Massachusetts*, 97 U. S., 25; *Patterson v. Kentucky*, 97 U. S., 501; *Fertilizing Company v. Hyde Park*, 97 U. S., 659; *Boyd v. Alabama*, 94 U. S., 645; *Bartemeyer v. Iowa*, 18 Wall., 129. State may discontinue offices and abolish or change municipal corporations. *Butler v. Pennsylvania*, 10 How., 402. See also *East Hartford v. Hartford Bridge Company*, 10 How., 511.

ing its taxing power in particular cases, and where it has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied.<sup>192</sup>

Nor is it competent for a State, after a contract has been made, to withdraw property, then liable to be seized and sold in enforcement of that contract, from the power of the courts to seize and sell it.<sup>193</sup>

So with respect to State insolvent laws; they cannot discharge the obligation of a contract entered into before their passage, nor do such laws apply to the contracts of citizens of other States, unless the creditor makes himself a party to the proceedings under the law.<sup>194</sup>

**§ 81. Constitution of the United States—Taking Private Property for Public Use—Compensation.**—The concluding clause of the Fifth Amendment of the CONSTITUTION, which declares “Nor shall private property be taken for public use without just compensation,” operates solely upon Federal power, and is not intended to interfere with the rights of the States and of their citizens.<sup>195</sup> The right of eminent domain exists in the government of the United States, and may be exercised by it within the States, when necessary to the enjoyment of the powers conferred upon it by the CONSTITUTION; and the constitutional provision just mentioned is an

<sup>192</sup> *Wolff v. New Orleans*, 103 U. S., 358; *University v. People*, 99 U. S., 309; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *State Bank of Ohio v. Knoop*, 16 How., 369; *Wilmington Railroad Company v. Reid*, 13 Wall., 264; *Humphrey v. Pegues*, 16 Wall., 244; *Pacific Railroad Company v. Maguire*, 20 Wall., 36; *Washington University v. Rouse*, 8 Wall., 439; *Home of the Friendless v. Rouse*, 8 Wall., 430.

<sup>193</sup> *McCracken v. Haywood*, 2 How., 608; *Bronson v. Kinzie*, 1 How., 311; *Green v. Biddle*, 8 Wheat., 1. But this doctrine, it is said, does not apply to property which was exempt from sale at time contract was made. *City of New Orleans v. Morris*, Sup. Ct. U. S., May 8, 1882, 4 Mor. Trans., 802; *Edwards v. Kearzey*, 96 U. S., 595.

<sup>194</sup> See section 68, and notes, p. 224, *ante*. See also *Cooley's Const. Lim.* (4 Ed.), 359–361.

<sup>195</sup> *Withers v. Buckley*, 20 How., 84; *Fox v. Ohio*, 5 How., 410; *Barron v. Baltimore*, 7 Pet., 243; *Bonaparte v. Camden and Amboy Railroad Company*, Bald., 205; *Pumpelly v. Green Bay Company*, 13 Wall., 166. It is a limitation on the right of eminent domain, and not on the taxing power. *Gilman v. City of Sheboygan*, 2 Black, 510.

implied assertion that, on making just compensation, private property may be taken.<sup>196</sup>

Serious interruption to the common and necessary use of property may be equivalent to taking it. It is not necessary that it should be absolutely taken to bring it within the protection of the CONSTITUTION.<sup>197</sup>

**§ 82. Constitution of the United States—Faith and Credit—Public Acts—Judicial Proceedings.**—The fourth article of the CONSTITUTION provides: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Under this provision of the CONSTITUTION, which, as we shall see, is one of the greatest importance, when we come to consider the relation of the States of the Union to each other, and the laws of Congress passed in pursuance thereof,<sup>198</sup> few questions seem to have arisen

<sup>196</sup> *Kohl v. United States*, 91 U. S., 367. See note 29, p. 32, *ante*.

<sup>197</sup> Mr. Justice Miller, speaking for the court in *Pumpelly v. Green Bay Company*, 13 Wall., 166, after referring to a provision of the Constitution of Wisconsin, almost identical in language with the one under consideration, says: "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizens, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

<sup>198</sup> Section 905 of the Revised Statutes, taken from acts of May 26, 1790, and March 27, 1804, is as follows:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceed-

respecting legislative acts<sup>199</sup> or records, not embracing judgments and decrees.<sup>200</sup>

But with respect to judgments and decrees, and the effect to be given to them, the decisions have been both considerable and impor-

ings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Section 906, Revised Statutes, taken from acts of March 27, 1804, and February 21, 1871, is as follows:

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the Governor or Secretary of State, the chancellor or keeper of the great seal of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such Governor, Secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have • such faith and credit given to them in every court and office within the United States as they have by law or usage, in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."

<sup>199</sup> Held in *United States v. Johns*, 4 Dall., 412, that an act of the Legislature was sufficiently authenticated by the seal of the State; that the attestation of any public officer was not required. And in *United States v. Amedy*, 11 Wheat., 392, that printed copies with interlineations duly authenticated might be used. In *Craig v. Brown*, Pet. C. C., 352, a seal of the State of Louisiana was held necessary to authenticate a law of the Territory of Orleans. See also *Pease v. Peck*, 18 How., 595, p. 601.

<sup>200</sup> Mr. Justice Hunt, delivering the opinion of the court in *Crapo v. Kelly*, 16 Wall., 610, after quoting from the act of May 26, 1790, to the effect that records and judicial proceedings should have such faith and credit given to them in every court within the United States as they had by law or usage in the courts of the State from whence the records were taken, says: "Under this statute it has been held in this court, from an early day, that the faith and credit spoken of are not limited to the form of the record, and are not satisfied by its admission as a record. It is held that the

tant. "When our revolution began," says Mr. Justice Swayne, "and independence was declared, and the Confederation was being formed, it was seen by the wise men of that day that the powers necessary to be given to the Confederacy, and the rights to be given to the citizens of each State in all the States, would produce such intimate relations between the States and persons that the former would no longer be foreign to each other, in the sense that they had been as dependent provinces; and that for the prosecution of rights, in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different States. Accordingly, in the Articles of Confederation, there was this clause: 'Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.' Now, though this does not declare what was to be the effect of a judgment obtained in one State in another State, what was meant by the clause may be considered as conclusively determined, almost by contemporaneous exposition. For when the present CONSTITUTION was formed, we find the same clause introduced into it, with but a slight variation, making it more comprehensive, and adding: 'Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof,' thus providing in the CONSTITUTION for the deficiency which experience had shown to be in the provision of the Confederation, as the Congress under it could not legislate upon what should be the effect of a judgment obtained in one State in the other States. Whatever difference of opinion there may have been as to the interpretation of this article of the CONSTITUTION in another respect, there has been none as to the power of Congress under it to declare what shall be the effect of a judgment of a State court in another State of the Union."<sup>201</sup>

same effect is to be given to the record in the courts of the State where produced as in the courts of the State from which it is taken." Citing *Mills v. Duryee*, 7 Cranch, 483; *Leland v. Wilkinson*, 6 Pet., 317; *United States v. Johns*, 4 Dall., 412. In this case the record referred to was the record of the court of probate and insolvency in the State of Massachusetts, offered in a court of the State of New York.

<sup>201</sup> *McElmoyle v. Cohen*, 13 Pet., 312, pp. 325 and 326. In *Mills v. Duryee*, 6 Cranch, 481, generally referred to as the leading case on the subject, Mr. Justice



A personal judgment, it is now settled, is without any validity if it be rendered by a State court in an action upon a money demand against a non-resident of the State, who was served by publication of summons, but upon whom no personal service of process, within the State, was made, and who did not appear; and no title to property passes by a sale under an execution issued upon such a judgment.<sup>202</sup>

But where it appears that the court had jurisdiction of the subject-

Story says: "It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments."

In *Hampton v. McConnel*, 3 Wheat., 234, Mr. Chief Justice Marshall disposes of the case by saying: "This is precisely the same case as *Mills v. Duryee*. The court cannot distinguish the two cases. The doctrine there held was that the judgment of a State court should have the same credit, validity and effect in every other court in the United States which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court of the United States." See also *Insurance Company v. Harris*, 97 U. S., 331, where it is held that a final decree of a State should be admitted as matter of evidence, having the same force and effect in a court of the United States as in the courts of a State. Citing *Mills v. Duryee*, 6 Cranch., 481; *Mayhew v. Thatcher*, 6 Wheat., 129; *Habich v. Folger*, 20 Wall., 1; *Burnley v. Stephenson*, 24 Ohio, 474; *Dobson v. Pearce*, 12 N. Y., 156.

In *Turnbull v. Payson*, 95 U. S., 418, it was held that the record of a district court of the United States is not within the act of Congress of May 29, 1790 (1 Stat., 122), prescribing the mode in which the records and judicial proceedings of the State courts shall be authenticated, but is, when duly certified by the clerk, under its seal, admissible as evidence in every other court of the United States. And in this case it is said: "Records of State courts, in order that they may be admissible in the courts of other States, must be authenticated as required in that provision, but the act of Congress does not apply to the courts of the United States, nor to the public acts, records, or judicial proceedings of a State court, to be used as evidence in another court of the same State. Conclusive support to that proposition is found in many decided cases in addition to those to which reference has already been made." Amongst former references is *Mewster v. Spalding*, 6 McLean, 24. See *Wiggins Ferry Company v. Chicago and A. R. Co.*, 11 Fed. Rep., 381, and note; and see also *Owens v. Gotzian*, 4 Dill., 436.

A decree of divorce, valid and effectual according to the law and adjudications in the State where rendered, is equally conclusive in the courts in all other States. *Cheever v. Wilson*, 9 Wall., 108. See also *Green v. Van Buskirk*, 7 Wall., 139.

<sup>202</sup> *Pennoyer v. Neff*, 95 U. S., 714; note 160, p. 108, *ante*. See also *Harkness v. Hyde*, 98 U. S., 476; *Brooklyn v. Insurance Company*, 99 U. S., 362; *Livingston County v. Darlington*, 101 U. S., 407; *Mohr v. Manierre*, 101 U. S., 417; *Insurance Company v. Bangs*, 103 U. S., 435; *Galpin v. Page*, 18 Wall., 350.

In *Hall v. Lanning*, 91 U. S., 160, it was held that service upon one member of a partnership did not bind a non-resident partner not served, although some of the

matter, and that process was duly served, or an appearance duly entered, the judgment or decree is conclusive, and is not open to inquiry upon the merits.<sup>203</sup> Fraud cannot, therefore, be pleaded to an action in one State upon a judgment in another by parties or privies; nor is the plea of *nil debet* a good plea in such case.<sup>204</sup>

members caused an appearance to be entered for all, and although the law of the State where the suit was brought authorized such a judgment.

Notwithstanding the record shows a return of the sheriff that a party was personally served with process, he may show, to the contrary, that he was not served, and that the court never acquired jurisdiction of his person. *Knowles v. Gaslight and Coke Company*, 19 Wall., 59; citing, with approval, *Thompson v. Whitman*, 18 Wall., 457. Held in *Kuhn v. Miller*, 3 Dill., 373, that where the laws of a State provide that bonds given to release property from attachment, and conditioned for its redelivery to the officer, shall form part of the record, and that judgment thereon, in the event of the plaintiff's recovery, shall be entered against the principal and surety of such bond, without *scire facias* or notice, a judgment thus entered is not void, as to the surety, for want of notice, although such surety may at the time be a non-resident of the State.

See, as to effect of appearance by attorney, *Hill v. Mendenhall*, 21 Wall., 453.

"The clause of the Federal Constitution," it is said, "which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction, the records are not entitled to credit." *Public Works v. Columbia College*, 17 Wall., 521; citing *D'Arcy v. Ketchum*, 11 How., 174; *Bates v. Delevan*, 5 Paige, 305; *Story on Conflict of Laws*, section 546.

<sup>203</sup> *Lamp Chimney Company v. Brass and Copper Company*, 91 U. S., 656, p. 661; citing 2 *Smith's Leading Cases* (7 Ed.), 622; *Freeman on Judgments* (2 Ed.), section 606; *Hampton v. McConnel*, 3 Wheat., 234; *Gelson v. Hoyt*, *Id.*, 312; *Slocum v. Mayberry*, 2 *Id.*, 10; *Nations v. Johnson*, 24 How., 203; *D'Arcy v. Ketchum*, 11 How., 166; *Webster v. Reid*, 11 How., 437.

<sup>204</sup> *Maxwell v. Stewart*, 22 Wall., 77; citing *Christmas v. Russell*, 5 Wall., 304. Referring to the Constitution and to the Revised Statutes, section 605, *Woods, C. J.*, in *Barras v. Bidwell*, 3 *Woods's*, 5, says: "From this statement of the law, it is clear that the plea that judgment was obtained by fraud cannot hold, unless it would be good in the courts of the State where the judgment was rendered." Citing *Hampton v. McConnel*, 3 Wheat., 234; *Christmas v. Russell*, 5 Wall., 290; *Maxwell v. Stewart*, 22 Wall., 77; *Mills v. Duryee*, 7 Cranch, 481; *Hockaday v. Skeggs*, 18 La. An., 682; and *McLaren v. Kehler*, 23 La. An., 80.

In *Maxwell v. Stewart*, 22 Wall., 77, *Stewart* recovered a judgment against *Maxwell* in Kansas. Upon this judgment he brought suit against *Maxwell* in New Mexico. *Maxwell* set up as his fifth ground of defense against the judgment, "That the judgment sued on was obtained by false and fraudulent assertion of a contract, and by means of false and interested testimony." Mr. Chief Justice *Waite*, by whom

It is not a valid objection against the jurisdiction of the court rendering the judgment that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived as provided by statute.<sup>206</sup>

The CONSTITUTION does not restrain the right of each State to legislate as to the remedy on suits on judgments in other States, hence limitation laws, as applicable to such judgments, will be upheld.<sup>206</sup> And no greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. "Any other rule," it is said, "would contravene the policy of the provisions of the CONSTITUTION and the laws of the United States on that subject."<sup>207</sup>

A judgment rendered in one State is not a lien upon property in another State, and no execution can be issued thereon. It must be made a judgment in another State, and can only be executed as its laws permit.<sup>208</sup> And a judgment rendered in one State is only bind-

the opinion of the court was delivered, disposes of the matter by saying: "In *Christmas v. Russell*, 5 Wall., 304, this court held that fraud could not be pleaded to an action in one State upon a judgment in another. With this we are satisfied." (p. 81.) Whilst the judgment may bind parties and privies so as to cut off the defense of fraud, strangers to the judgment may show its collusive or fraudulent character. *Atkinson v. Allen*, 12 Vermont, 624, cited in *Christmas v. Russell*, 5 Wall., p. 306. See *Maxwell v. Stewart*, 22 Wall., 77; citing, as to the inadmissibility of the defense of fraud, *Christmas v. Russell*, 5 Wall., 304, and, as to the inadmissibility of the plea of *nil debet*, *Mills v. Duryee*, 7 Cranch., 481. See also *Amory v. Amory*, 3 Biss., 266, per Mr. Justice Miller. On same point, remarks of court in *Michaels v. Post*, 21 Wall., pp. 426 and 427.

As to inadmissibility of plea of *nil debet*, see *Mills v. Duryee*, 7 Cranch, 481; *Amory v. Amory*, 3 Biss., 266.

<sup>206</sup> *Maxwell v. Stewart*, 21 Wall., 71. Mere irregularities in the rendition of the judgment constitute no defense. Where a judgment was recovered against a corporation under a wrong name, an action will be sustained thereon in another State by averring that it is the same corporation. *Lafayette Insurance Company v. French*, 18 How., 404. And where a claim in reconvention could have been litigated under a counter-claim filed in the original action, it cannot be set up against the judgment in an action on it in another State. *Barras v. Bidwell*, 3 Woods's, 5.

<sup>206</sup> *Bacon v. Howard*, 20 How., 22; *Bank of Alabama v. Dalton*, 9 How., 522.

<sup>207</sup> *Public Works v. Columbia College*, 17 Wall., 521, p. 529.

<sup>208</sup> *McElmoyle v. Cohen*, 13 Pet., 312; *Green v. Sarmiento*, 3 Wash., 17; S. C., 1 Pet., C. C., 74; *Watkins v. Holman*, 16 Pet., 25. Held in *Barrett v. Failing*, 3 Fed.

ing upon parties and privies in another State; hence an action of debt will not lie against an administrator in one State on a judgment obtained against a different administrator of the same intestate, appointed in another State.<sup>209</sup>

§ 83. **Treaties.**—The CONSTITUTION declares that “All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”<sup>210</sup>

This clause, it has been held, is retroactive as well as prospective.<sup>211</sup> Where a treaty operates of itself, without the aid of any legislative provision, it will be regarded in courts of justice as equivalent to an act of the legislature.<sup>212</sup> But as a treaty is, in its nature, a contract between two nations, and not a legislative act, it does not generally effect, of itself, the object to be accomplished, especially so far as its object is *infra*-territorial, but is carried into effect by the sovereign powers of the parties to the instrument. When, therefore, “either of the parties *engage* to perform a particular act, the treaty addresses itself to the *political*, and not the *judicial* department, and the *legislature* must execute the contract before it can become a rule for the court.”<sup>213</sup>

Rep., 471, that a decree of divorce in one State gave the complainant no interest in lands in another State, notwithstanding such was its effect in the State where rendered, and notwithstanding the validity of the decree, as to the divorce, was unquestioned. See note 37, p. 207, *ante*, and *Bennett v. Bennett*, Deady, 299.

As to decree in one State passing title to lands in another State. see note 160, p. 108, *ante*.

<sup>209</sup> *Stacy v. Thrasher*, 6 How., 44; *McLean v. Meek*, 18 How., 16. See *Hill v. Tucker*, 13 How., 458, as to effect of judgment against one of several executors residing in different States.

<sup>210</sup> Article 6, section 2. The States are prohibited from making treaties. Article 1, section 10.

<sup>211</sup> *Hanenstein v. Lynham*, 100 U. S., 483.

<sup>212</sup> *Foster v. Neilson*, 2 Pet., 253; note 135, p. 102, *ante*.

<sup>213</sup> *United States v. Arredondo*, 6 Pet., 691, p. 735; citing *Foster v. Neilson*, 2 Pet., 253. This last case depended, amongst other things, upon the construction of the eighth article of the treaty between the United States and Spain, of February 22, 1819. The eighth article stipulates that “All grants of land made before the twenty-fourth of January, 1818, by his Catholic majesty, or by his lawful authorities in the said Territories, ceded by his majesty to the United States, shall be ratified and

But where a treaty affects the rights of parties litigating in court, it as much binds those rights, and is as much to be regarded by the courts, as an act of Congress.<sup>214</sup> And the courts can no more go behind a treaty, for the purpose of annulling its effect and operation,

confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the Territories had remained under the dominion of his Catholic majesty."

"Do these words," say the court, speaking through Mr. Chief Justice Marshall, "act directly on the grants, so as to give validity to those not otherwise valid, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?" (P. 314.) After the speaking of the nature of treaties, as in the text, he proceeds: "It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of Congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, etc. By whom shall they be ratified and confirmed? This seems to be the language of contract, and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject."

See also *Garcia v. Lee*, 12 Pet., 511; *Scott v. Sandford*, 19 How., 393, p. 630; *United States v. Andres Castillero*, 2 Black, 1, p. 320; *Chouteau v. Eckhart*, 2 How., 344, p. 375.

The treaty of 1819, between the United States and Spain, contains the following: "The United States shall cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

Mr. Chief Justice Taney, delivering the opinion of the court in *United States v. Ferreira*, 13 How., 40, says (p. 46): "The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. \* \* \* \* Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfill that promise, it is a question between the United States and Spain."

<sup>214</sup> *United States v. Schooner Peggy*, 1 Cranch, 103. In this case Mr. Chief Justice Marshall, delivering the opinion of the court, says: "The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by, the executive of each nation; and, therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an

than they can behind an act of Congress;<sup>215</sup> nor will the courts, when a treaty is made and ratified, inquire into the authority of the persons making it.<sup>216</sup>

A treaty overrules all State laws in conflict with it, and is as much a part of the law of every State as its own local laws and Constitution.<sup>217</sup> But an act of Congress may supersede a prior treaty, or a treaty may supersede a prior act of Congress.<sup>218</sup>

act of Congress; and, although restoration may be an executive, when viewed as a substantive act, independent of and unconnected with other circumstances, yet, to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence improper."

See also, *Ropes v. Clinch*, 8 Blatch., 304; *Taylor v. Morton*, 2 Curtis, 454; *Talbot v. Seaman*, 1 Cranch, 1; *Ware v. Hylton*, 3 Dall, 199.

Referring to the power of the government of the United States to make a grant of land by treaty without the consent of Congress, it is said: "On the contrary there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political." *Holden v. Joy*, 17 Wall., 211, p. 247; citing *Wilson v. Wall*, 6 Wall., 89; *Insurance Company v. Canters*, 1 Pet., 542; *Doe v. Wilson*, 23 How., 461; *Mitchell v. United States*, 9 Pet., 749; *United States v. Brooks*, 10 How., 460; *The Kansas Indians*, 5 Wall., 737; 2 Story on Constitution, § 1508; *Foster v. Nielson*, 2 Pet., 254; *Crews v. Burcham*, 1 Black, 356; *Worcester v. Georgia*, 6 Pet., 562; *Blair v. Pathkiller*, 2 Yer., 407; *Harris v. Barnett*, 4 Blackford, 369. In *Wilson v. Wall*, *supra*, the doctrine is expressly announced that "Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals."

<sup>215</sup> *Fellows v. Blacksmith*, 19 How., 366, citing *United States v. Peggy*, 1 Cranch, 103; *United States v. Arredondo*, 6 Pet., 691; *Foster v. Neilson*, 2 Pet., 253; *United States v. Brooks*, 10 How., 442.

<sup>216</sup> *Doe v. Braden*, 16 How., 635; *Fellows v. Blacksmith*, 19 How., 366.

<sup>217</sup> *Hauenstein v. Lynham*, 100 U. S., 483; *Ware v. Hylton*, 3 Dall., 199; *Hopkirk v. Bell*, 3 Cranch, 454; *Martin v. Hunter*, 1 Wheat., 304; *Chirac v. Chirac*, 2 Wheat., 259; *Carnal v. Banks*, 10 Wheat., 181; *Hughes v. Edwards*, 9 Wheat., 489; *Shanks v. Dupont*, 3 Pet., 242; *The Cherokee Tobacco*, 11 Wall., 616; *Gordon v. Kerr*, 1 Wash., 322.

<sup>218</sup> *The Cherokee Tobacco*, 11 Wall., 616. In this case Mr. Justice Swayne, delivering the opinion of the court, observes: "It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (*Foster & Elam v. Neilson*,

The termination of a treaty by war does not divest rights of property already vested under it;<sup>219</sup> and with respect to the date when treaties take effect, the rule is, unless otherwise provided for, that they are binding from the day on which they are signed, and that their subsequent ratification relates back to that period.<sup>220</sup>

But in some cases, as affecting individual rights, treaties are to be considered as of the date of their ratification.<sup>221</sup>

Treaties with Indians are as much the law of the land as treaties with foreign powers;<sup>222</sup> and rules of interpretation favorable to the Indian tribes are to be adopted in construing treaties with them.<sup>223</sup>

#### § 84. Laws of United States — Supremacy, Operation

2 Peters, 314), and an act of Congress may supersede a prior treaty. (*Taylor v. Morton*, 2 Curtis, 454; *The Clinton Bridge*, 1 Walw., 155.) In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration, the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief."

See also *Pollard v. Kibbe*, 14 Pet., 353.

<sup>219</sup> *Society, etc. v. New Haven*, 8 Wheat., 464. See also, *United States v. Perchman*, 7 Pet., 51; *Strother v. Lucas*, 12 Pet., 410.

<sup>220</sup> *Davis v. Police Jury of Concordia*, 9 How., 280.

<sup>221</sup> *United States v. Sibbald*, 10 Pet., 313; citing *United States v. Arredondo*, 6 Pet., 691. "In this country a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned." *Haver v. Yaker*, 9 Wall., 32.

<sup>222</sup> *Turner v. American Baptist Missionary Association*, 5 McLean, 344.

<sup>223</sup> *The Kansas Indians*, 5 Wall., 737.

**and Evidence of.**—The same clause of the CONSTITUTION which declares the supremacy of that instrument, and the supremacy of treaties made, or which shall be made, under the authority of the United States, also declares that “*the laws of the United State, which shall be made in pursuance thereof,*” that is, in pursuance of the CONSTITUTION, “shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”<sup>224</sup> The power of the Federal courts to adjudge acts of Congress unconstitutional and void has already been considered. A law of the United States, made in pursuance of the CONSTITUTION, is supreme over State constitutions, ordinances of State conventions, and State legislative enactments;<sup>225</sup> and in all cases of conflict arising under such laws, the power of ultimate and final determination rests with the Supreme Court of the United States.<sup>226</sup> Whenever a question arises as to the existence of a statute, the time when it took effect, or its precise terms, the court may resort to any source of information which is, in its nature, capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which, in its nature, is most appropriate, unless the positive law has enacted a different rule.<sup>227</sup>

<sup>224</sup> Constitution, article 6, section 2. Mr. Chief Justice Taney, in delivering the opinion of the court in *Ableman v. Booth*, 21 How., 506, directs attention to the language used in the Constitution touching the supremacy of the laws, as indicating the precision and foresight which marks every clause in that instrument. “The sovereignty to be created,” says he, “was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution.” See page 131, *ante*.

<sup>225</sup> *Ableman v. Booth*, 21 How., 506. The Statutes of the United States are as much the law of the land in any State as are those of the State, and, although exclusive jurisdiction for their enforcement may be given to the Federal courts, yet, where it is not given, either expressly or by necessary implication, the State courts, having competent jurisdiction in other respects, may be resorted to. *Clafin v. Houseman*, 93 U. S., 130. See note 207, p. 120, *ante*.

<sup>226</sup> *Ableman v. Booth*, 21 How., 506.

<sup>227</sup> *Gardner v. The Collector*, 6 Wall., 499; cited, with approval, in *Town of South Ottawa v. Perkins*, 94 U. S., 260, p. 268.

A statute, for the commencement of which no time is fixed, commences from its



The laws of the United States, where not locally inapplicable, have the same force and effect within all the organized Territories as elsewhere within the United States;<sup>228</sup> and, in some cases, are administered by consular courts over citizens of the United States in foreign countries.<sup>229</sup>

Whenever an act is repealed, which repealed a former act, the former act is not thereby revived, unless it be expressly so provided.<sup>230</sup> And the repeal of a statute will not release or extinguish any penalty, forfeiture, or liability incurred thereunder, unless so expressly provided in the repealing act, and such statute will be considered as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.<sup>231</sup> The courts, both Federal and State, take judicial notice of the laws of the United States.<sup>232</sup>

date. *Matthews v. Lane*, 7 Wheat., 164. See also *Lapeyre v. United States*, 17 Wall., p. 191; *In re Amkrim*, 3 McLean, 285; *In re Richardson*, 2 Story, 571; *The Ann*, 1 Gallis., 62; *Arnold v. United States*, 9 Cranch, 104. Precise time of day on which act became a law may sometimes be inquired into. *In re Wynne*, Chase, 227; *Salmon v. Burgess*, 21 Int. Rev. Rec., 333; S. C., 1 Hughes, 356.

<sup>228</sup> Revised Statutes, section 1891, reads: "The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

<sup>229</sup> Revised Statutes, sections 4085 and 4086. The last section reads: "Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others, to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies."

<sup>230</sup> Revised Statutes, section 12.

<sup>231</sup> Revised Statutes, section 13. *Bechtel v. United States*, 101 U. S., 597; *United States v. Ulrici*, 3 Dill., 532. See also *Kensett v. Stivers*, 18 Blatch., 397.

<sup>232</sup> See page 226, *ante*.

As to the evidence of such laws: Before the revision, the Statutes at Large, as published by Little & Brown, under contract with the government, were evidence of the several public and private acts of Congress in all the courts and tribunals and public offices of the United States and of the several States.<sup>233</sup> The old, or first, edition of the revision contains all statutes in force December 1, 1873, and must, it is held, be treated as the legislative declaration of the statute law on that day on the subjects which it embraces. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.<sup>234</sup> In the law authorizing the printing and promulgation of this edition, said edition was made legal evidence of the laws therein contained in all the courts of the United States and of the several States and Territories.<sup>235</sup> The act providing for the new editions of the Revised Statutes declared that it should "be *legal and conclusive* evidence of the laws and *treaties* therein contained in all the courts of the United States and of the several States and Territories."<sup>236</sup> This provision was afterwards amended by striking out the words "and conclusive" and "treaties," and by adding to the sentence, so that it now reads, "shall be legal evidence of the laws therein contained in all the courts of the United States and of the several States and Territories, but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three."<sup>237</sup> With respect to the Statutes at Large, or laws

<sup>233</sup> Section 2 of act of August 8, 1846, 9 Statutes at Large, p. 75.

<sup>234</sup> *United States v. Bowen*, 100 U. S., 508; cited, with approval, in *Arthur v. Dodge*, 101 U. S., p. 34; and in *Vietor v. Arthur*, 104 U. S., p. 499.

<sup>235</sup> Section 2 of act of June 20, 1874, 18 Statutes at Large, p. 113; 1 Sup. Rev. Statutes, p. 50.

<sup>236</sup> Section 4 of act of March 2, 1877, 19 Statutes at Large, p. 268; 1 Sup. Rev. Statutes, p. 285.

<sup>237</sup> Act of March 9, 1878, 20 Statutes at Large, p. 27; 1 Sup. Rev. Statutes, p. 308. Held, by Blatchford, J., in *McLean v. St. Paul and Chicago R. R. Co.*, 17 Blatch., 363, in answer to the contention that the second edition of the Revised Statutes, printed

of each session of Congress since June 20, 1874, as printed and published by authority, under the direction of the Secretary of State, these are made "legal evidence of the laws and treaties therein contained in all the courts of the United States and of the several States therein."<sup>238</sup>

In the supplement to the Revised Statutes, as prepared by Judge William A. Richardson, and printed by the government, under authority of law, it is provided that it "shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States and of the several States and Territories therein, but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act passed as by Congress; *provided*, that nothing herein contained shall be construed to change or alter any existing law."<sup>239</sup>

**§ 85. Laws of United States as Source of Rights Generally.**—Whilst a considerable number of important rights are founded upon, or may be traced to, the laws of the United States, still, as compared with the laws of the several States, they are the source of but a small portion of those general rights of persons and of property which constitute the usual subjects of judicial cognizance and enforcement.

This results, as before explained, from the nature of the Federal government, as a government of the Union of the States, exercising certain delegated and enumerated powers necessary or pertaining to its character as such, whilst sovereignty for the protection of life and personal liberty, and for regulating the acquisition, enjoyment and

and promulgated in 1878. was a re-enactment of the Revised Statutes in 1878, and that subdivision 1 of section 639, found in it, displaces the act of March 3, 1875, that the publication of the Revised Statutes did not affect any statute passed subsequently to December 1, 1873. See to same effect *Norris v. Mineral Point Tunnel et al.*, 7 Fed. Rep., 272; *The Marine City*, 6 Fed. Rep., 413; *United States v. Bane*, 5 Fed. Rep., 192; 15 Court of Claims Rep., 80. 453.

<sup>238</sup> Section 8 of Act of June 20, 1874, 18 Statutes at Large, p. 113; 1 Sup. Rev. Statutes, p. 52.

<sup>239</sup> Act of June 7, 1880, 21 Statutes at Large, p. 308; 1 Sup. Rev. Statutes, p. 582.

disposition of property, remains, for the most part, with the States.<sup>240</sup> The powers of the Federal government are defined and limited by the CONSTITUTION, and it can make only such laws as shall be in pursuance of that instrument;<sup>241</sup> and the main office of the CONSTITUTION, as we have already observed, is not so much to *create* and *grant*, as it is to *secure* and *guarantee* rights.<sup>242</sup>

With respect, however, to rights which emanate from, or are specially recognized and protected by, Federal legislation, we shall, without presenting the law in detail, for this is beyond the scope of our work, notice the subjects of citizenship, expatriation, suffrage, civil rights, patent rights, copy rights, trade marks, public lands, and some of the subjects, not embraced in the above, covered by section 8 of article 1 of the CONSTITUTION, which, under the limits imposed by that instrument, fall peculiarly within the sphere of congressional regulation and control. We shall also, though, perhaps, belonging more properly to the province of *remedies*, notice some of those rights and privileges which are accorded by law to suitors in the courts of the United States, and which may be insisted upon and exercised by them, independent of State legislation and practice.

**§ 86. Laws of United States — Citizenship — Expatriation — Suffrage.**— In considering who are *citizens* for the purpose of conferring jurisdiction upon the courts of the United States, we had occasion to notice most of the statutory provisions upon the subject of citizenship.<sup>243</sup> It is to be borne in mind that the same person may, at the same time, be a citizen of the United States and a citizen of a State, or a person may be a citizen of the United States and not a citizen of any particular State.<sup>244</sup>

It is not within the power of a State to make the subject of a

<sup>240</sup> See section 57, p. 199, *ante*.

<sup>241</sup> See section 72, p. 234, and section 84, p. 263, *ante*.

<sup>242</sup> See p. 235, *ante*.

<sup>243</sup> See p. 63, *et seq.*, *ante*. See Revised Statutes, Title 25, "CITIZENSHIP."

<sup>244</sup> *United States v. Cruikshank*, 92 U. S., 542. See section 59, p. 204, and note 33, p. 205, *ante*.

foreign government a citizen of the United States, and the mode provided by Congress for the purpose must be conformed to.<sup>245</sup>

Naturalized citizens of the United States, while in foreign countries, are entitled to the same protection of persons and property which is accorded to native-born citizens.<sup>246</sup> And provision is made for prompt inquiry into the violation of any of the rights of American citizenship in foreign countries.<sup>247</sup>

Only citizens of the United States can claim the benefit of the Federal homestead and pre-emption laws,<sup>248</sup> or receive a passport to a foreign country;<sup>249</sup> and all vessels of the United States must be owned and commanded by citizens,<sup>250</sup> and none others than vessels wholly owned by citizens of the United States can be registered under the laws thereof.<sup>251</sup> Officers of the vessels of the navy must, in all cases, be citizens of the United States.<sup>252</sup>

The right of expatriation is declared by statute to be the "natural and inherent right of all people."<sup>253</sup>

The right of the elective franchise, except in Territories,<sup>254</sup> emanates from the States, and not from the United States.<sup>255</sup>

It is the *right of exemption* from discrimination in its exercise on account of race, color, or previous condition of servitude, which the Fifteenth Amendment of the CONSTITUTION empowers Congress to enforce by appropriate legislation. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment, and can be exercised by providing a punishment only

<sup>245</sup> *Lanz v. Randall*, 4 Dill., 425; Revised Statutes, Title 30.

<sup>246</sup> Revised Statutes, section 2000.

<sup>247</sup> Revised Statutes, section 2001.

<sup>248</sup> As to homesteads, see Revised Statutes, section 2289. As to pre-emptions, Revised Statutes, section 2259.

<sup>249</sup> Revised Statutes, section 4076.

<sup>250</sup> Revised Statutes, section 4131.

<sup>251</sup> Revised Statutes, section 4132.

<sup>252</sup> Revised Statutes, section 1428.

<sup>253</sup> Revised Statutes, section 1999.

<sup>254</sup> Revised Statutes, section 1860.

<sup>255</sup> *United States v. Cruikshank*, 92 U. S., 542; *United States v. Anthony*, 11 Blatch., 200.

when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color or previous condition of servitude.<sup>266</sup> And it has been held that no Federal statute can interfere with voters, except at an election for representative in Congress, and then only as to their protection in voting for a representative in Congress;<sup>267</sup> and, further, that any such statute which attempts to punish individuals acting on their own responsibility, and not as officers of the United States, or of a State, or otherwise, under pretended authority of laws prohibited by said amendment, is void.<sup>268</sup>

### § 87. Laws of the United States—Civil Rights Acts.—

Five acts, commonly spoken of as the *civil rights acts*, have been passed by Congress for the purpose of giving effect to the Thirteenth, Fourteenth and Fifteenth Amendments of the CONSTITUTION. The first, entitled "An act to protect all persons in the United States in their civil rights and furnish the means of their vindication,"<sup>269</sup> was

<sup>266</sup> *United States v. Reese*, 92 U. S., 214. In this case it was held that sections 3 and 4 of the act of May 31, 1870 (16 Statutes at Large, p. 140; Revised Statutes, sections 2007, 2008, 2009, 5507), not being confined in their operations to unlawful discriminations on account of race, color or previous condition of servitude, were beyond the limit of the fifteenth amendment, and unauthorized. In *United States v. Amsdem*, 6 Fed. Rep., 819, section 5 of the same act (act of May 31, 1870, Revised Statutes, section 5507), was held void because not limiting the prescribed acts for which punishment was to be inflicted to discriminations on account of race, color, etc. See also *Harrison v. Hadley*, Governor, 2 Dill., 229; *McKay v. Campbell*, 2 Abb. U. S., 120; S. C., 1 Saw., 374. A governor of a State is not an elective officer within act of May 31, 1870. *United States v. Clayton*, 2 Dill., 219. A supervisor of an election, appointed under the laws of the United States, is an officer of an election within section 5515. And while the judges of an election at which a representative in Congress is voted for are engaged in counting the ballots cast, to mingle with the ballots cast ballots bearing the name of a candidate for Representative in Congress which the defendant well knew had not been voted by any of the electors at such an election, constitutes "an unlawful interference with the judges of the election, in the discharge of their duties," under section 5511. *United States v. Fisher*, 8 Fed. Rep., 414. See also *United States v. Quinn*, 8 Blatch., 48; *United States v. Hirschfield*, 13 Blatch, 330. As to law on subject, see Revised Statutes, Title 26, "THE ELECTION FRANCHISE." See also Revised Statutes, sections 5506, 5507, 5511, 5512, 5513, 5520, 5521, 5522, 5523, 5528, 5529, 5530, 5531.

<sup>267</sup> *United States v. Cahill*, 9 Fed. Rep., 80.

<sup>268</sup> *United States v. Amsdem*, 6 Fed. Rep., 819.

<sup>269</sup> 14 Statutes at Large, p. 27.

passed April 9, 1866, a few months after the adoption of the Thirteenth Amendment.<sup>260</sup>

The second, entitled "An act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes,"<sup>261</sup> frequently referred to as the *enforcement act*, was passed May 31, 1870, nearly two years after the adoption of the Fourteenth, and about two months after the adoption of the Fifteenth Amendment.<sup>262</sup>

The third, entitled "An act to amend an act, approved May thirty-first, eighteen hundred and seventy, entitled 'an act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes,'" <sup>263</sup> was passed February 28, 1871.

The fourth, entitled "An act to enforce the provisions of the Fourteenth Amendment to the CONSTITUTION of the United States, and for other purposes," was passed April 20, 1871.

The fifth and last, entitled "An act to protect all citizens in their civil and legal rights,"<sup>264</sup> was passed March 1, 1875.

All of these acts are incorporated in the Revised Statutes,<sup>265</sup> except the last, the full text of which we have given in another place.<sup>266</sup>

<sup>260</sup> The Thirteenth Amendment was, by proclamation issued December 18, 1865, declared to have been ratified.

<sup>261</sup> 16 Statutes at Large, 140.

<sup>262</sup> The proclamation announcing the ratification of the Fourteenth Amendment was issued July 28, 1868, and of the Fifteenth Amendment March 30, 1870.

<sup>263</sup> 16 Statutes at Large, p. 433.

<sup>264</sup> 18 Statutes at Large, p. 336.

<sup>265</sup> ACT OF APRIL 9, 1866. — For section 1 of this act, see Revised Statutes, sections 1978, 1992; for section 3, see Revised Statutes, sections 563, 629, 642, 646, 699, 722; for section 4, see Revised Statutes, sections 1982, 1983; for section 5, see Revised Statutes, sections 1984, 1985; for section 7, see Revised Statutes, sections 1986, 1987; for section 8, see Revised Statutes, section 1988; for section 9, see Revised Statutes, section 1989; and for section 10, see Revised Statutes, section 699.

ACT OF MAY 31, 1870. — For section 1 of this act, see Revised Statutes, section 2004; for section 2, see Revised Statutes, sections 2005, 2006; for section 3, see Revised Statutes, sections 2007, 2008; for section 4, see Revised Statutes, sections 2009, 5506; for section 5, see Revised Statutes, section 5507; for section 6, see Revised

<sup>266</sup> See p. 140, *ante*.

Apart from certain provisions, which relate to the operations of the government and the discharge of duty by its officers, the main purpose of all of these enactments is to secure freedom in the exercise of the right of the elective franchise, and the equal protection of all in the enjoyment of their civil rights, without regard to nativity, race, color, previous condition of servitude, or persuasion, religious or political. Such of their provisions as pertain to rights of persons and of property, and afford a civil remedy to the injured party for invasions thereof, will be considered.

And, first, it is provided that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings

Statutes, section 5508; for section 7, see Revised Statutes, section 5509; for section 8, see Revised Statutes, sections 629, 1022; for section 9, see Revised Statutes, sections 1982, 1983; for section 10, see Revised Statutes, sections 1984, 1985, 5517; for section 11, see Revised Statutes, section 5516; for section 12, see Revised Statutes, sections 1986, 1987; for section 13, see Revised Statutes, section 1989; for section 14, see Revised Statutes, sections 563, 629, 1786, 1787; for section 15, see Revised Statutes, section 1787; for section 16, see Revised Statutes, sections 563, 629, 641, 699, 1977, 2164; for section 17, see Revised Statutes, section 5510; for section 19, see Revised Statutes, section 5511; for section 20, see Revised Statutes, section 5512; for section 21, see Revised Statutes, section 5514; for section 22, see Revised Statutes, section 5515; for section 23, see Revised Statutes, sections 563, 629, 2010.

ACT OF FEBRUARY 28, 1871. — For section 1 of this act, see Revised Statutes, section 5513; for section 2, see Revised Statutes, section 2011; for section 3, see Revised Statutes, section 2014; for section 4, see Revised Statutes, section 2016; for section 5, see Revised Statutes, sections 2017, 2018; for section 6, see Revised Statutes, section 2017; for section 7, see Revised Statutes, section 2020; for section 8, see Revised Statutes, sections 2021, 2022; for section 9, see Revised Statutes, section 2023; for section 10, see Revised Statutes, sections 5522, 5523; for section 11, see Revised Statutes, section 5521; for section 12, see Revised Statutes, section 2024; for section 13, see Revised Statutes, sections 2025, 2026, 2027; for section 14, see Revised Statutes, section 3689; for section 15, see Revised Statutes, section 629; for section 16, see Revised Statutes, sections 643, 646; for section 17, see Revised Statutes sections 645, 950; for section 19, see Revised Statutes, section 27.

ACT OF APRIL 20, 1871. — For section 1 of this act see Revised Statutes, sections 563, 629, 699, 1979; for section 2, see Revised Statutes, sections 563, 629, 699, 1980, 5336, 5406, 5407, 5518, 5519, 5520; for section 3, see Revised Statutes, section 5299; for section 5, see Revised Statutes, sections 800, 801, 822; for section 6, see Revised Statutes, sections 629, 1981.



for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”<sup>267</sup>

And that “All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property.”<sup>268</sup>

And that “Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the CONSTITUTION and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”<sup>269</sup>

When an act is done in furtherance of any of the several conspiracies mentioned in section 1980, Revised Statutes, whereby another is injured in his person or property, or deprived of having or exercising any rights or privileges of a citizen of the United States, the party so injured or deprived is given right of action, for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.<sup>270</sup>

The like right of action, provided the suit be commenced in one year after the cause of action occurred, is given to the party injured, or his legal representatives, against persons who, having knowledge that the wrongs conspired to be done, mentioned in said section 1980, are about to be committed, and having power to prevent, or aid in preventing, their commission, neglect and refuse so to do, if such wrongful act be committed, for all damage caused by such wrongful act, which such person, by reasonable diligence, could have prevented. Such damages may be recovered in an action on the case, and any number of persons guilty of such wrongful neglect or refusal may be

<sup>267</sup> Revised Statutes, section 1977, revising section 16 of Act of May 31, 1870.

<sup>268</sup> Revised Statutes, section 1978, revising section 1 of act of April 9, 1866.

<sup>269</sup> Revised Statutes, section 1979, revising section 1 of act of April 20, 1871.

<sup>270</sup> Revised Statutes, section 1980, revising section 2 of act of April 20, 1871.

joined as defendants in the action. If death be caused by such wrongful act or neglect, the legal representatives of the deceased shall have action therefor, and may recover not exceeding \$5000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, for the benefit of the next of kin of the deceased.<sup>271</sup>

The act of March 1, 1875, declares "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."<sup>272</sup>

And provides that any person violating, or aiding or inciting others to violate, the provisions of said act, shall forfeit and pay the sum of \$500 to the person injured thereby, to be recovered in an action of debt, with full costs.<sup>273</sup>

The right given by these acts to recover certain offices,<sup>274</sup> and to remove certain causes<sup>275</sup> from the State to the Federal courts, and right of review on error and appeal<sup>276</sup> by the Supreme Court of the United States of certain questions of law, have already been noticed. Attention has also been directed to the right of action given for certain invasions of the right of suffrage.<sup>277</sup>

**§ 88. Laws of United States—Civil Rights Acts—Rule of Decision—Construction, etc.**—The Revised Statutes provide: "The jurisdiction in *civil* and criminal matters conferred on the district and circuit courts by the provisions of this title, and of title CIVIL RIGHTS, and of title CRIMES, for the protection of

<sup>271</sup> Revised Statutes, section 1981, revising section 6 of act of April 20, 1871.

<sup>272</sup> See p. 140, *ante*.

<sup>273</sup> See p. 140, *ante*.

<sup>274</sup> See pp. 161-178, *ante*.

<sup>275</sup> See section 36, p. 169, *ante*.

<sup>276</sup> See section 19, pp. 139 and 140, *ante*.

<sup>277</sup> See section 86, p. 268, *ante*.

all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause; and if it is of a criminal nature, in the infliction of punishment on the party found guilty." <sup>278</sup>

The above applies to the acts of April 9, 1866, May 31, 1870, February 28, 1871, and April 20, 1871, these being, as before stated, incorporated in the revision. With respect to the act of March 1, 1875, it gives to persons, who are entitled to sue thereunder, the privilege of suing for the penalty of \$500, or of proceeding under their rights at common law and by State statutes, with the condition that, after having elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction should be barred. <sup>279</sup>

Coming now to the construction placed upon these acts by the courts of the United States, a rule of first importance to be kept in view is that the Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution, upon which they must rest for support, are directed to *State action* alone, and that no power is conferred upon Congress to punish private individuals, who, acting without any authority from the State, invade the rights of citizens which are protected by such amendment. <sup>280</sup> Applying this test, several of the pro-

<sup>278</sup> Section 722, revising section 3 of act of April 9, 1866, and section 18 of act of May 31, 1870.

<sup>279</sup> Section 2; see p. 140, *ante*.

<sup>280</sup> *Virginia v. Rives*, 100 U. S., 313; *LeGrand v. United States*, 12 Fed. Rep., 577; *United States v. Buntin*, 10 Fed. Rep., 730; *Smoot v. Kentucky Central Railroad Company*, 13 Fed. Rep., 337.

visions of these acts have been sustained,<sup>281</sup> and some adjudged void.<sup>282</sup> And, under the Fifteenth Amendment, an act of Congress, which is not confined in its operation to unlawful discrimination, on account of race, color, or previous condition of servitude, is unau-

<sup>281</sup> Section 641, Revised Statutes, authorizing removal of causes, etc., held not to be in conflict with the Constitution. *Strauder v. West Virginia*, 100 U. S., 303; *Virginia v. Rives*, 100 U. S., 313.

Sections 1977 and 1978, Revised Statutes, referred to as authorized by the Constitution. *Virginia v. Rives*, 100 U. S., 313; *Neal v. Delaware*, 103 U. S., 370.

The constitutionality of sections 2011, 2012, 2016, 2017, 2021, 2022 and 5515, Revised Statutes, relating to violation of election laws, sustained in *Ex Parte Siebold*, 100 U. S., 371. See also, as to section 5515, *Ex Parte Clarke*, 100 U. S., 399.

The jury clause (section 4) of act of March 1, 1875, held constitutional. *Ex Parte Virginia*, 100 U. S., 339.

In note to *United States v. Buntin*, 10 Fed. Rep., p. 738, it is stated that Judge Emmons held that the inhibitions of the Fourteenth Amendment were aimed only at the action of the State, and have no reference to individuals; that the right to "the full and equal enjoyment of the accommodations, advantages, facilities and privileges of theaters and inns," comes from the State, and the protection of that right is not within the power of Congress, and the act of March 1, 1875, to that extent is unconstitutional. 2 Am. L. T. Rep. (N. S.), 198. Judges Blatchford and Choate divided on the question and certified it to the Supreme Court. *United States v. Singleton*, 1 Crim. Law Mag., 386. See *United States v. New Comer*, 22 Int. Rev. Rec., 115, per Cadwalader, J. See Cooley on Torts, pp. 284-6.

In *Smoot v. Kentucky Central Railroad Company*, 13 Fed. Rep., 337, the constitutionality of the equality guaranteed by the first section of the act of March 1, 1875, is mooted but not decided; but the court did hold in this case that in an action in the United States Circuit Court, brought under said act, where the petition alleged that plaintiffs (who were colored persons) and defendants were citizens of Kentucky, and that plaintiff purchased a first-class ticket over defendants' road from one place to another in Kentucky, and that on account of race and color, plaintiff (Mrs. Smoot) was denied admission to the ladies' car, Congress had no right to protect the right alleged to have been violated, and the court had no jurisdiction to entertain the action. After referring to the first section of said act and the Fourteenth Amendment of the Constitution, and stating that there was no law of Kentucky known to the court which would prevent the plaintiff from recovering for the wrong complained of, it is said: "In other words, can Congress give the court jurisdiction *over this subject and between citizens of the same State*, unless Kentucky has, by its laws or through its officers or agencies, denied to plaintiff the equal protection of the laws or abridged her 'privileges or immunities' as a citizen of the United States?" The demurrer to the petition, because it failed to allege that the State of Kentucky had denied to the plaintiff the equal protection of its laws, etc., was sustained.

<sup>282</sup> In *LeGrand v. United States*, 12 Fed. Rep., 577, section 5519, Revised Statutes, was held void. See note 30, p. 204, *ante*.

thorized.<sup>283</sup> It is necessary, in a prosecution for deprivation of rights, privileges, etc., that the act must have been done under color of a law, statute, ordinance, regulation, or custom of a State, and on account of alienage, color, or race.<sup>284</sup>

And in an indictment, and in a civil action for the penalty, under the act of March 1, 1875, the citizenship of the person injured must be alleged and proved.<sup>285</sup>

**§ 89 Laws of United States—Patent-right, Copyright and Trade Mark Laws.**—Power is granted by the CONSTITUTION to Congress, "To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>286</sup>

**PATENT-RIGHTS.**—In pursuance of the authority here conferred, it is provided by law that, "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication, in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale, for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."<sup>287</sup>

<sup>283</sup> Held in *United States v. Reese*, 92 U. S., 214, that the third and fourth sections of the act of May 31, 1870 (R. S., sections 2007, 2008, 2009 and 5506), were void.

<sup>284</sup> *United States v. Buntin*, 10 Fed. Rep., 730, construing section 5510, Revised Statutes. See note at end of case, and *Bertonneau v. Directors*, 3 Woods's, 177. *Smoot v. Kentucky Central Railway Company*, 13 Fed. Rep., 337.

<sup>285</sup> *Lewis v. Hitchcock*, 10 Fed. Rep., 4; *United States v. Taylor*, 3 Fed. Rep. 563.

<sup>286</sup> Article 1, section 8, clause 8. Trade marks held not to be within the meaning of this provision either as inventions or as discoveries. See note 292, p. 280, *post*. As to spirit and purpose of constitutional provision, see *Grant v. Raymond*, 6 Pet., 218.

<sup>287</sup> Revised Statutes, section 4896. Patents may be granted to the assignee of the inventor (sections 4895 and 4928), and if a person who has made a new invention or discovery, for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent devolves on his executor or administrator, in trust for the heirs at law of the deceased, in case he dies intestate; or if he left a will disposing of the same, then in trust for his devisees, in as full man-

And "Any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented, or described in any printed publication, may, upon payment of the fee prescribed, and other due proceedings had,

ner, and on the same terms and conditions, as the same could have been claimed or enjoyed by him in his lifetime. (Sections 4896 and 4916.) See *Rubber Company v. Goodyear*, 9 Wall., 788. Every patent, or any interest therein, is assignable in law by an instrument in writing, and the patentee, or his assignees or legal representatives, may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. All assignments, grants or conveyances are, however, void as against subsequent purchasers and mortgagees for a valuable consideration and without notice, unless recorded in the Patent Office within three months from the date thereof.

A patent right may be subjected, by bill in equity, to the payment of a judgment debt of the patentee. *Ager v. Murray*, Snp. Ct. U. S., 4 Mor. Trans., 173.

Where, by the application of the invention or discovery for which letters patent have been granted by the United States, tangible property comes into existence, its use is, to the same extent as that of any other species of property, subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or police. *Patterson v. Kentucky*, 97 U. S., 501. Letters patent granted by the United States do not exclude from the operation of the tax or license law of a State the tangible property in which the invention or discovery is embodied. *Webber v. Virginia*, 103 U. S., 344. But a State cannot pass a law regulating sale of patent rights. *Ex Parte Robinson*, 2 Biss., 309; *Woollen v. Baker*, 17 Alb. L. J., 72; S. C., 5 Rep., 259, per Mr. Justice Swayne.

The government of the United States has no right to use a patented invention without compensation to the owner of the patent. *James v. Campbell*, 104 U. S., 356.

A patent is *prima facie* evidence that the patentee was the first inventor, and casts on him who denies it the burden of sustaining his denial by proof. *Smith v. Goodyear Dental Vulcanite Company*, 93 U. S., 486.

The rights growing out of an invention may be sold, including the right to use it, though no patent ever issues for it. *Hammond v. Mason, etc., Company*, 92 U. S., 724.

the same as in cases of inventions or discoveries, obtain a patent therefor.”<sup>288</sup>

Patents contain a grant to the patentee, his heirs or assigns, for *inventions* for the term of seventeen years, and for *designs* for the term of three years and six months, or for seven or fourteen years, as the applicant may elect, of the exclusive right to make, use and vend the invention or discovery, throughout the United States and Territories thereof.<sup>289</sup>

COPYRIGHTS.—With respect to copyrights, it is provided that, “Any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models, or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter (chapter 3, title 40), have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors may reserve the right to dramatize or to translate their own works.”<sup>290</sup>

The right granted is for the term of twenty-eight years, and may, upon certain conditions, be continued for the further term of fourteen years.<sup>291</sup>

TRADE MARKS.—“Owners of trade marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or

<sup>288</sup> Revised Statutes, section 4929.

<sup>289</sup> Revised Statutes, sections 4884–4931. As to extension of term of patent, see sections 4924, 4925, 4926, 4927 and 4928.

<sup>290</sup> Revised Statutes, section 4952. As to nature of property in copyright, as based upon the Constitution and statutes, independent of common law, see *Wheaton v. Peters*, 8 Pet., 591, and note 9, p. 42, *ante*.

<sup>291</sup> Revised Statutes, sections 4953 and 4954.

tribes which, by treaty, convention or law, affords similar privileges to citizens of the United States, may obtain registration of such trade marks," by complying with the requirements of the law in that behalf<sup>292</sup> made. And "Citizens and residents of this country wishing the protection of trade marks in any foreign country, the laws of which require registration here as a condition precedent to getting such protection there, may register their trade marks for that purpose, as is above allowed to foreigners, and have certificate thereof from the Patent Office."<sup>293</sup>

Certificates of the registry of trade marks remain in force thirty years from date, except in cases where the trade mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of a foreign country for a shorter period, in which case it ceases to have any favor in this country at the time it ceases to be exclusive property elsewhere.<sup>294</sup>

<sup>292</sup> Section 1 of act of March 3, 1881, entitled "An act to authorize the registration of trade marks and protect the same." 21 Statutes at Large, p. 502; 1 Supplement Revised Statutes, p. 606.

It was held by the Supreme Court of the United States, at October term, 1879, in Trade Mark Cases, 100 U. S., 82, that a trade mark was neither an invention, a discovery, nor a writing, within the meaning of clause 8, section 8, article 1, of the Constitution, which conferred on Congress power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries. It was further held in this case that if an act of Congress could, in any case, be extended as a regulation of commerce to trade marks, it must be limited to their use in "commerce with foreign nations and among the several States, and with the Indian tribes," and that the legislation of Congress (Revised Statutes, chapter 2, title 60, and act of August 14, 1876, 19 Statutes at Large, p. 141) was void for want of constitutional authority, inasmuch as it was so framed that its provisions were applicable to all commerce, and could not be confined to that which was subject to the control of Congress. The act of March 3, 1881, was passed, no doubt, to conform to the views expressed in this opinion. This act makes the registration of a trade mark *prima facie* evidence of ownership (section 7), and authorizes the Commissioner of Patents to make rules and regulations and prescribe forms for the transfer of the right to use trade marks, and for recording such transfers in his office. (Section 12.)

<sup>293</sup> Section 13 of act of March 3, 1881, 1 Supplement Revised Statutes, p. 608.

<sup>294</sup> Section 5 of act of March 3, 1881, 1 Supplement Revised Statutes, p. 607. By section 3 of this act it is provided that "At any time during the six months prior to the expiration of the term of thirty years, such registration may be renewed, on the same terms and for a like period."



Owners of patents, copyrights, and trade marks are given by statute the right to enter the courts of the United States for the protection of their interests.<sup>295</sup>

§ 90. **Laws of United States — Public Lands.** — Mr. Justice Catron, in delivering the opinion of the court in *Carpenter v. Providence Washington Insurance Company*,<sup>296</sup> remarks: "By the CONSTITUTION, Congress is given 'power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,'<sup>297</sup> for the disposal of the public lands, there-

<sup>295</sup> As to patent-rights, see pp. 159, 141 and 119, *ante*. Circuit Court, sitting in equity, may empanel jury in patent cases for determination of questions of fact, and verdict has same effect as in case of issues sent from chancery to court of law. Act of February 16, 1875, 18 Statutes at Large, p. 315; 1 Supplement Revised Statutes, pp. 135 and 136. See *Watt v. Starke*, 101 U. S., 247.

As to copyrights, see pp. 159, 141 and 119, *ante*.

As to trade marks, see act of March 3, 1881, 1 Supplement Revised Statutes, pp. 607 and 608, which provides (section 7) that "Any person who shall reproduce, counterfeit, copy, or colorably imitate any trade mark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy, according to the course of equity, to enjoin the wrongful use of such trade mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act. And courts of the United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy." And by section 10 of said act it is provided "That nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade mark might have had if the provisions of this act had not been passed." And by section 11 "That nothing in this act shall be construed as unfavorably affecting a claim to a trade mark, after the term of registration shall have expired, nor to give cognizance to any court of the United States in an action or suit between citizens of the same State, unless the trade mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe."

<sup>296</sup> 4 How., 169, p. 185.

<sup>297</sup> Clause 2, section 3 of article 4. See, construing this provision, *United States v. Gratiot*, 14 Pet., 526; *Seymour v. Sanders*, 3 Dill., 437. For legislation of Congress on the subject, see Revised Statutes, title 32, "THE PUBLIC LANDS," and 1 Supplement to Revised Statutes, Index: *Homestead — Land Districts — Lands, Land Patents and Pre-emption*.

fore, in the new States, where such lands lie, Congress may provide by law, and having the constitutional power to pass the law, it is supreme; so Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no State law, whether of limitations or otherwise, can defeat such title."<sup>298</sup>

In another case it is said: "It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles as the government may deem most advantageous to the public fisc, or, in other respects, most politic."<sup>299</sup>

Whenever the question, in any court, State or Federal, is whether the title to land, which had once been the property of the United States, has passed, it must be resolved by the laws of the United States. If, by those laws, the title has passed, then, like all other property in the State, it is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.<sup>300</sup>

<sup>298</sup> In *Gibson v. Chouteau*, 13 Wall., 92, it is held that the power of Congress, in the disposal of the public domain, cannot be interfered with or its exercise embarrassed by any State legislation, nor can such legislation deprive the grantees of the United States of the possession and enjoyment of the property granted, by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. And further, that the occupation of lands derived from the United States before the issue of their patent for the period prescribed by the statutes of limitation of a State for the commencement of actions for the recovery of real property, is not a bar to an action of ejectment for the possession of such lands founded upon the legal title subsequently conveyed by the patent. Nor does such occupation constitute a sufficient equity in favor of the occupant to control the legal title, thus subsequently conveyed, whether asserted in a separate suit in a Federal court, or set up as an equitable defense to an action of ejectment in a State court. See also *Union Mill and Mining Company v. Ferris*, 2 Sawy., 176; *Langdeau v. Hanes*, 21 Wall., 521; *Carrol v. Safford*, 3 How., 441; *Bronson v. Kukuk*, 3 Dill., 490.

<sup>299</sup> *Irvine v. Marshall*, 20 How., 558, p. 561.

<sup>300</sup> *Wilcox v. Jackson*, 13 Pet., 498; *United States v. Fitzgerald*, 15 Pet., 407; *Irvine v. Marshall*, 20 How., 558; *Gibson v. Chouteau*, 13 Wall., 92; see note 301, *infra*.

And where the right to a patent is complete, and the equitable title fully vested, without anything more to be paid, or any act done going to the foundation of the right, the lands may be taxed.<sup>301</sup>

A confirmatory statute passes a title as effectually as if its terms contained a grant *de novo*, and a grant may be made by law as well as by a patent pursuant to law.<sup>302</sup>

Whilst "a patent is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal,"<sup>303</sup> a party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land acquires a vested interest therein, and is equitable owner thereof. While his entry and location remains in full force and effect, his rights thereunder will not be defeated by the issue of a patent to another party for the same tract, and a patent issued to such other party will be adjudged void.<sup>304</sup> And, it has been held, in a case where a party in

<sup>301</sup> *Railway Company v. Prescott*, 16 Wall., 603; *Witherspoon v. Duncan*, 4 Wall., 210; *Lamborn v. County Commissioners*, 97 U. S., 181; *Colorado County v. Commissioners*, 95 U. S., 259. But see *Railway Company v. McShane*, 22 Wall., 444, modifying and partially overruling *Railway Company v. Prescott*, *supra*, and announcing as the true doctrine that where the government has issued the patent, the lands are taxable, whether the payment of the costs of survey, etc., have been made to the United States or not. See, in this connection, *Railroad Company v. Commissioners*, 98 U. S., 541; and *Hunnewell v. Cass County*, 22 Wall., 464.

<sup>302</sup> *Ryan v. Carter*, 93 U. S., 78; *Tameling v. United States Freehold, etc., Company*, 93 U. S., 644; *Morrow v. Whitney*, 95 U. S., 551; *Palmer v. Low*, 98 U. S., 1; see also *Wilcox v. Jackson*, 13 Pet., 498; *Grignon v. Astor*, 2 How., 319; *Reichart v. Felps*, 6 Wall., 160.

<sup>303</sup> Per Mr. Justice Grier delivering the opinion of the court in *United States v. Stone*, 2 Wall., 525, p. 535; *Bagnell v. Broderick*, 13 Pet., 436; *Hooper v. Scheimer*, 23 How., 235.

<sup>304</sup> *Wirth v. Branson*, 98 U. S., 118; see also *Starke v. Starrs*, 6 Wall., 402; *Frisbie v. Whitney*, 9 Wall., 187; *The Yosemite Valley Case*, 15 Wall., 77; *Railway Company v. McShane*, 22 Wall., 444; *Shepley v. Cowen*, 91 U. S., 330.

Unless forbidden by positive law, contracts made by actual settlers on the public lands, concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title. *Lamb v. Davenport*, 18 Wall., 307; citing *Sparrow v. Strong*, 3 Wall.,

possession of lands, holding an uncanceled certificate of the Register of the Land Office within whose district they are situated, showing that full payment has been made for them, is sued in ejectment by one who subsequently enters the lands and obtains patent therefor, the plaintiff was not entitled to recover.<sup>305</sup>

But this does not militate against the doctrine that a patent, duly signed, countersigned and sealed, for public lands, which, at the time it was issued, the Land Department had, under the statute, authority to convey, cannot be collaterally impeached in an action at law; and the finding of the department touching the existence of certain facts, or the performance of certain antecedent acts upon which the lawful exercise of that authority may, in a particular case, depend, cannot, in a court of law, be questioned. And if, in the issuing of a patent, the officers of that department take mistaken views of the law, or draw erroneous conclusions from the evidence, or act from either imperfect views of duty or corrupt motives, the party aggrieved cannot set up such matters in a court of law to defeat the patent. He must resort to a court of equity, where he can obtain relief, if his rights are injuriously affected by the existence of the patent, and he possesses such equities as will control the legal title vested in the patentee. A stranger to the title cannot complain of the action of the government in regard thereto.<sup>306</sup>

97; *Myers v. Croft*, 13 Wall., 291; *Davenport v. Lamb*, 13 Wall., 418; *Thredgill v. Pintard*, 12 How., 24.

<sup>305</sup> *Simmons v. Wagner*, 101 U. S., 260. "The question is not," says the court, "whether Wagner (who was defendant in the court below), if he was out of possession, could recover in ejectment upon the certificate, but whether Simmons (who was plaintiff in the court below), can recover as against him. He (Wagner) is in a situation to avail himself of the weakness of the title of his adversary, and need not assert his own." (P. 262.)

<sup>306</sup> *Smelting Company v. Kemp*, 104 U. S., 636. In this case, after referring to the cases of *Hoofnagle v. Anderson*, 7 Wheat., 212; *Boardman v. Lessee of Reed*, 6 Pet., 328; *Bagnell v. Broderick*, 13 Pet., 436; *Johnson v. Towsley*, 13 Wall., 72; *Moore v. Robbins*, 96 U. S., 530; *Minter v. Crommelin*, 18 How., 87; *Patterson v. Winn*, 11 Wheat., 380; and *Polk's Lessee v. Wendell*, 9 Cranch, 87, it is said (p. 646): "On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling

The inference of any claim of right, whether legal or equitable, against the United States, growing out of mere possession, is very slight indeed,<sup>307</sup> and such possession of public land, without title, for any time, however long, will not enable a party to maintain a suit against any one who enters upon it, and more especially against a person who derives title from the United States.<sup>308</sup>

. In the progress of proceedings to acquire, under the laws of the United States, a title to public land, the power of the Land Department over them ceases when the last official act necessary to transfer the title to the successful claimant has been performed. Title by patent from the United States is title by record, and the delivering of the patent itself to the patentee is not, as in a conveyance by a private person, essential to pass the title. When, therefore, the officers whose action is rendered by the laws necessary to vest the title in the claimant have decided in his favor, and the patent to him has been duly signed, sealed, countersigned, and recorded, the title of the land passes to him, and the ministerial duty of delivering the instrument can be enforced by mandamus.<sup>309</sup>

But, as a general rule, no vested right, as *against the United States*, so as to impair, in any respect, the power of Congress to dispose of public land in any way it may deem proper, is acquired until all the

them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question, but its authority to act at all is denied and shown never to have existed." See also *Sherman v. Buick*, 93 U. S., 209, that testimony, whether parol or documentary, which shows a want of power in officers who issue a patent, is admissible in an action at law to defeat a title set up under it, and that in such case, the patent is not merely voidable, but absolutely void, and the party is not obliged to resort to a court of equity to have it so declared; citing *Stoddard v. Chambers*, 2 How., 317; *Easton v. Salisbury*, 21 How., 426; *Reichart v. Felps*, 6 Wall., 160. See also *Patterson v. Tatum*, 3 Sawy., 164; *Marquez v. Frisbie*, 101 U. S., 473.

<sup>307</sup> *Simmons v. Ogle*, Sup. Ct. U. S., April 10, 1882, 4 Mor. Trans., 479.

<sup>308</sup> *Burgess v. Gray*, 16 How., 48; *Oaksmith v. Johnston*, 92 U. S., 343.

<sup>309</sup> *United States v. Schurz*, 102 U. S., 378.

<sup>310</sup> *The Yosemite Valley Case*, 15 Wall., 77; *Frisbie v. Whitney*, 9 Wall., 187; *Homestead Company v. Valley Railroad*, 17 Wall., 153; *McCarty v. Mann*, 2 Dill., 441.

prerequisites for the acquisition of the title have been complied with.<sup>310</sup> This rule, however, will not prevent private parties, as against each other, from acquiring a right to be preferred in the purchase or other acquisition of land, when the United States have determined to sell or donate the property.<sup>311</sup>

Nor will a failure to record a patent defeat the grant.<sup>312</sup>

With respect to the distinction between *legal* and *equitable* title, it would seem almost unnecessary to add that an action of ejectment will not lie in the courts of the United States on an equitable title, as, for instance, on an entry made with the Register and Receiver of the Land Office, notwithstanding a State legislature may have otherwise provided by statute, for such law is only binding on the State courts;<sup>313</sup> though, as already noticed, the defendant in such an action may, in some cases, successfully defend even as against the patent of the government.<sup>314</sup>

**§ 91. Laws of United States—Revenue—Commerce—Money—Army—Navy—War—Insurrection—Forts—Dock Yards—Postmasters and Postoffices, etc.—**Rights may accrue under, or be controlled by, laws passed in pursuance of those provisions of the CONSTITUTION which confer upon Congress the power to lay and collect taxes, duties, imposts, and excises;<sup>315</sup> to pay the debts and provide for the common defense and general welfare of

<sup>311</sup> *Shepley v. Cowan*, 91 U. S., 330.

<sup>312</sup> *McGarrahan v. Miniog Company*, 96 U. S., 316.

<sup>313</sup> *Hooper v. Scheimer*, 23 How., 235; citing *Fenn v. Holme*, 21 How., 481. See also *Miller v. Kerr*, 7 Wheat., 1; *Irvine v. Marshall*, 20 How., 558; *Gibson v. Chouteau*, 13 Wall., 92; *Patterson v. Tatam*, 3 Sawy., 164.

<sup>314</sup> See note 305, p. 284, *ante*.

<sup>315</sup> Article 1, section 8, clause 1. For construction of this provision, see *Springer v. United States*, 102 U. S., 586; *Loughborough v. Blake*, 5 Wheat., 317; *Pacific Insurance Company v. Soule*, 7 Wall., 433; *Scholey v. Rew*, 23 Wall., 331; *Dobbins v. Commissioners of Erie County*, 16 Pet., 435; *Cooley v. Board of Wardens of Philadelphia*, 12 How., 299; *License Tax Cases*, 5 Wall., 462; *Woodruff v. Parham*, 8 Wall., 123; *Collector v. Day*, 11 Wall., 113; *United States v. Singer*, 15 Wall., 111; *United States v. Railroad Company*, 17 Wall., 322. See Revised Statutes, Index: *Imports and Importation—Customs—Custom Duties—Revenue and Revenue Laws*, and same titles in 1 Supplement Revised Statutes.

the United States;<sup>316</sup> to borrow money on the credit of the United States;<sup>317</sup> to regulate commerce with foreign nations and among the several States, and with the Indian tribes;<sup>318</sup> to establish uniform laws, on the subject of bankruptcies throughout the United States;<sup>319</sup> to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;<sup>320</sup> to establish postoffices and postroads;<sup>321</sup> declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;<sup>322</sup> to raise and

<sup>316</sup> Article 1, section 8, clause 1.

<sup>317</sup> Article 1, section 8, clause 2. *Weston v. Charleston*, 2 Pet., 449; *The Banks v. The Mayor*, 7 Wall., 16; *Bank of Commerce v. New York City*, 2 Black, 620.

<sup>318</sup> Article 1, section 8, clause 3. See *Gibbons v. Ogden*, 9 Wheat., 1; and amongst the more recent cases, *Telegraph Company v. State of Texas*, Sup. Ct. U. S., April 3, 1882, 4 Mor., Trans., 447; *Webber v. Virginia*, 103 U. S., 344; *County of Mobile v. Kimball*, 102 U. S., 691; *Packet Company v. St. Louis*, 100 U. S., 423; *Vicksburg v. Tobin*, 100 U. S., 430; *Guy v. Baltimore*, 100 U. S., 434; *Machine Company v. Gage*, 100 U. S., 676; *Beer Company v. Massachusetts*, 97 U. S., 25; *Keith v. Clarke*, 97 U. S., 454; *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S., 1; *Railroad Company v. Heusen*, 95 U. S., 465; *Hall v. DeCuir*, 95 U. S., 485; *Foster v. Master, etc., of New Orleans*, 94 U. S., 246; *United States v. Forty-three Gallons of Whisky*, 93 U. S., 188; *Sherlock v. Alling*, 93 U. S., 99; *South Carolina v. Georgia*, 93 U. S., 4; *Chy Lung v. Freeman*, 92 U. S., 275; *Henderson v. Mayor of New York*, 92 U. S., 259; *Welton v. State of Missouri*, 91 U. S., 275. See Revised Statutes, and 1 Supplement Revised Statutes, Index: *Commerce and Navigation—Domestic Commerce—Foreign Trade and Commerce—Navigation—Harbors—Rivers—Bridges—Canals—Ships—Vessels—Steam Vessels—Seamen—Merchant Seamen—Sailors—Coasting Trade—Railroads—Common Carriers—Passengers.*

<sup>319</sup> Article 1, section 8, clause 4. Bankrupt law repealed by act of June 7, 1878, to take effect September 1, 1878. 1 Supplement Revised Statutes, p. 335.

<sup>320</sup> Article 1, section 8, clause 5. *Briscoe v. Bank of Kentucky*, 11 Pet., 257; *United States v. Marigold*, 9 How., 560; *Fox v. Ohio*, 5 How., 410. See Revised Statutes, and 1 Supplement to Revised Statutes, Index: *Mints—Coin—Foreign Coin—Legal Tender—National Banks—United States Notes—Money—Weights and Measures.*

<sup>321</sup> Article 1, section 8, clause 7. *Ex Parte Jackson*, 96 U. S., 727; *Kohl v. United States*, 91 U. S., 367; *United States v. Bott*, 11 Blatch., 346; *Railway Mail Service Cases*, 13 Ct. of Cl., 199; *Pennsylvania v. Wheeling and Belmont Bridge Company*, 18 How., 421; *Sturtevant v. The City of Alton*, 3 McLean, 393. See Revised Statutes, and 1 Supplement to Revised Statutes, Index: *Postal Service—Postage—Postmaster-General—Postmasters—Postoffice Department—Postoffices—Post Roads—Mails.*

<sup>322</sup> Article 1, section 8, clause 11. *American Insurance Company v. Canter*, 1 Pet., 511; *Tyler v. Defrees*, 11 Wall., 331; *Miller v. United States*, 11 Wall., 268; *Young*

support armies;<sup>323</sup> to provide and maintain a navy;<sup>324</sup> to make rules for the government and regulation of the land and naval forces;<sup>325</sup> to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;<sup>326</sup> to provide for organizing, arming, disciplining the militia, and for governing such part of them as may be employed in the service of the United States;<sup>327</sup> to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;<sup>328</sup> and to make all laws which shall be necessary and proper for carrying into execution

v. United States, 97 U. S., 39; Ford v. Surgett, 97 U. S., 594; Lamar v. Brown, 92 U. S., 187; Hamilton v. Dillin, 21 Wall., 73; Stewart v. Kahn, 11 Wall., 493; Mrs. Alexander's Cotton, 2 Wall., 404; Brown v. United States, 8 Cranch, 110. See Revised Statutes, and 1 Supplement to Revised Statutes, Index: *Army—War Department—Letters of Marque—Captures—Captured and Abandoned Property—Prize.*

<sup>323</sup> Article 1, section 8, clause 12. Crandall v. Nevada, 6 Wall., 35; The Grapeshot, 9 Wall., 129. See references to statutes in preceding note 322.

<sup>324</sup> Article 1, section 8, clause 13. Dynes v. Hoover, 20 How., 65; United States v. Beavans, 3 Wheat., 336; *Ex Parte* Reed, 100 U. S., 13. See Revised Statutes and 1 Supplement to Revised Statutes, Index: *Navy—Navy Department—Navy Yards—Vessels—Marine Corps.*

<sup>325</sup> Article 1, section 8, clause 14. See notes 323 and 324, *supra*.

<sup>326</sup> Article 1, section 8, clause 15. Texas v. White, 7 Wall., 700. Dewing v. Perdicaries, 96 U. S., 193; Ketchum v. Buckley, 99 U. S., 188; Keith v. Clark, 97 U. S., 454; Daniels v. Tearney, 102 U. S., 415; United States v. Insurance Companies, 22 Wall., 99; Sprott v. United States, 20 Wall., 459; Luther v. Borden, 7 How., 1; Martin v. Mott, 12 Wheat., 19; Houston v. Moore, 5 Wheat., 1. See Revised Statutes, Index: *Insurrection—Rebellion.*

<sup>327</sup> Article 1, section 8, clause 16. Houston v. Moore, 5 Wheat., 1; Martin v. Mott, 12 Wheat., 19; Luther v. Borden, 7 How., 1. See Revised Statutes, Index: *Militia—Courts Martial.*

<sup>328</sup> Article 1, section 8, clause 17. United States v. Fox, 94 U. S., 315; Phillips v. Payne, 92 U. S., 130; Willard v. Presbury, 14 Wall., 676; United States v. DeWitt, 9 Wall., 41; Kendall v. United States, 12 Pet., 524; Cohens v. Virginia, 6 Wheat., 224. See Revised Statutes, and 1 Supplement to Revised Statutes, Index: *District of Columbia—Magazines—Arsenals—Dock Yards—Military Posts.*



the said powers and all other powers vested by the CONSTITUTION in the government of the United States, or any department or office thereof.<sup>329</sup>

When a case may be said to arise under these and other laws of the United States so as to enable the Federal courts to take jurisdiction thereof, has already been considered.<sup>330</sup> And the power of Congress, under the CONSTITUTION, to pass laws in furtherance of the objects above indicated has also been noticed.<sup>331</sup>

**§ 92. Laws of United States—Right to Sue and to Appear in Person and by Counsel.**—Where it is competent for the courts of the United States to take jurisdiction, the same right to sue and to be parties, and to the benefit of all proceedings for the security of persons and of property as is enjoyed by white citizens, is extended equally to all persons within their jurisdiction.<sup>332</sup> If the case is one of which cognizance may be had, it makes no difference that the statute of a State under which a right is asserted gives exclusive jurisdiction to the State tribunals.<sup>333</sup> In matters of remedy in the Federal courts, State laws and practice are operative to the extent only that they are authorized by Congress.<sup>334</sup> In addition to the constitutional provisions heretofore noticed, securing to the accused the assistance of counsel for his defense,<sup>335</sup> it is declared by statute that "In all the courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as, by the rules of the said courts respectively, are permitted to manage and conduct causes therein;"<sup>336</sup>

<sup>329</sup> Article 1, section 8, clause 18. See section 84, p. 263, *ante*.

<sup>330</sup> See sections 12 (p. 94), 17 (p. 136), 31 (pp. 156 and 157) and 32 (p. 163), *ante*.

<sup>331</sup> See section 84, p. 263, *ante*.

<sup>332</sup> See section 87, p. 270, *ante*.

<sup>333</sup> See p. 36 and notes, *ante*.

<sup>334</sup> *Wayman v. Southard*, 10 Wheat., 1; *Bank v. Halstead*, 10 Wheat., 51; *Beers v. Houghton*, 9 Pet., 329; *Ross v. Duval*, 13 Pet., 45.

<sup>335</sup> See section 79, p. 246, *ante*.

<sup>336</sup> Revised Statutes, section 747. Attorneys, solicitors and proctors may receive from their clients (other than the government) such reasonable compensation for their services, in addition to the fees authorized to be taxed as costs, as may be in

and, further, that "Every person who is indicted for treason, or other capital crime, shall be allowed to make his full defense by counsel learned in the law, and the court before which he is tried, or some judge thereof, shall, immediately upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours."<sup>337</sup>

**§ 93. Laws of United States—Trial by Jury—New Trials.**—The constitutional guaranties, with respect to the right of trial by jury, have been noticed.<sup>338</sup> In criminal cases it is a right which cannot be waived.<sup>339</sup>

It is provided by law that "The trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury,"<sup>340</sup> and that "The trial of all issues of fact in the circuit courts shall, in all suits except those of equity,<sup>341</sup> and of admi-

accordance with general usage in their respective States, or as may be agreed upon between the parties. Revised Statutes, sections 823 and 824. After quoting section 747, *supra*, in *Nightingale v. Oregon Central Railway Company*, 2 Sawy., 338, Deady, J., says: "When, in this court, a party does not choose to manage his cause personally, as permitted by this section, he can only do so by an attorney thereof. He cannot appoint an agent not an attorney of this court, and authorize such agent to represent him in the suit. But when a party makes his choice and selects an attorney of this court to conduct and manage his case, the attorney stands in his place. Until such attorney is changed or discharged, he has the exclusive control and management of the suit. He cannot give a release, or discharge the cause of action. But he has exclusive control of the remedy, and may continue or discontinue it. (*Gaillard v. Smart*, 6 Cow., 383; *Kellogg v. Gilbert*, 10 John., 220.) His client cannot control him in the due and orderly conduct of the suit. (*Anon.*, 1 Wend., 108.)"

<sup>337</sup> Revised Statutes, section 1034. See an interesting article on the right to counsel in a criminal case, in *American Law Register*, October, 1882, vol. 21, p. 625.

<sup>338</sup> See section 77, p. 242, *ante*.

<sup>339</sup> *United States v. Taylor*, 11 Fed. Rep., 470.

<sup>340</sup> Revised Statutes, section 689.

<sup>341</sup> As to equity cases, see *Lewis v. Cocks*, 23 Wall., 466; *Ely v. Monson, etc., Manufacturing Company*, 4 Fish. Patent Cases, 64; *Woodworth v. Roger*, 3 Wood & M., 135. In *Herdsmen v. Lewis*, 9 Fed. Rep., 853, it was held that while it was not doubted that a court of the United States, sitting in equity, might, in a proper case, direct issues of fact arising in an equity cause to be passed on by a jury, neither party had an absolute right to such a trial. As to effect of verdict on feigned issue, see *Watt v. Starke*, 101 U. S., 247.

ralty and maritime jurisdiction,<sup>342</sup> be by jury.”<sup>343</sup> And in the circuit court, in causes of admiralty and maritime jurisdiction, on the instance side of the court, with the consent of the parties, and in the trial of patent causes in equity, issues of fact may be submitted to a jury of not less than five nor more than twelve persons.<sup>344</sup>

With respect to the district court it is provided: “The trial of issues of fact in the district courts in all causes except cases in equity, and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction, relating to any matter of contract or *tort* arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories, upon the lakes and navigable waters connecting the lakes, the trial of issue of fact shall be by jury when either party requires it.”<sup>345</sup>

In the Territories the right of trial by jury in cases cognizable at common law is preserved.<sup>346</sup>

“No citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit

<sup>342</sup> As to admiralty causes, see cases referred to on this point in note 156, p. 244, *ante*.

<sup>343</sup> Concluding sentence of section 3 of act of March 3, 1875, p. 152, *ante*. Section 648 of the Revised Statutes reads as follows: “The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the next section.” The next section (649) reads: “Issues of fact in civil cases, in any circuit court, may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.” The circuit court cannot order a peremptory non-suit against will of plaintiff. See note 156, p. 243.

<sup>344</sup> Act of February 16, 1875, 18 Statutes at Large, p. 315; 1 Supplement Revised Statutes, p. 135.

<sup>345</sup> Revised Statutes, section 566. As to right to jury in summary trials for certain offenses against navigation laws, see Revised Statutes, sections 4301 and 4303.

<sup>346</sup> See proviso to section 1 of act of April 7, 1874, 18 Statutes at Large, p. 27; 1 Supplement Revised Statutes, p. 12.

juror in any court of the United States on account of race, color, or previous condition of servitude." <sup>347</sup>

The qualifications and exemptions of jurors to serve in the Federal courts correspond with those fixed by the laws of the State in which the court is sitting for jurors in the highest court of law in such State; <sup>348</sup> and the manner in which they are to be drawn or selected is directed by statute. <sup>349</sup>

<sup>347</sup> Section 2 of act of June 30, 1879, 21 Statutes at Large, p. 41; 1 Supplement Revised Statutes, pp. 497 and 498. See also section 4 of act of March 1, 1875, p. 141, *ante*.

<sup>348</sup> Revised Statutes, section 800. *United States v. Collins*, 1 Woods's, 499; *United States v. Williams*, 1 Dill., 485; *United States v. Wilson*, 6 McLean, 604; *United States v. Reed*, 2 Blatch., 435; *United States v. Douglass*, 2 Blatch., 207; *United States v. Tallman*, 10 Blatch., 21; *United States v. Tuska*, 14 Blatch., 5; *United States v. Devlin*, 6 Blatch., 71. But no person can serve as a petit juror more than one term in any one year. See section 2 of act of June 30, 1879, 21 Statutes at Large p. 43; 1 Supplement Revised Statutes, pp. 497 and 498. And it is expressly provided by section 822 of the Revised Statutes that "No person shall be a grand or petit juror in any court of the United States, upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of Title "CIVIL RIGHTS" and of Title "CRIMES," for enforcing the provisions of the Fourteenth Amendment to the Constitution, who is, in the judgment of the court, in complicity with any combination or conspiracy in said titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath, in open court, that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy."

<sup>349</sup> Act of June 30, 1879, 21 Statutes at Large, p. 43; 1 Supplement Revised Statutes, pp. 497 and 498. This act provides: "And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein.

"But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State." The provisions of this act are held to be mandatory, not directory. *United States v. Ambrose*, 3 Fed. Rep., 283. See also title 13, chapter 15, "JURORS," except sections 801, 820 and 821, which were repealed by act of June 30, 1879.

On the subject of challenges the following provision is made:

"When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."<sup>350</sup>

When a person is indicted for treason, a list of the jury, stating the place of abode of each juror, must be delivered to him at least three entire days before he is tried for the same, and when indicted for any other capital offense, a like list of jurors must be delivered to him at least two entire days before the trial.<sup>351</sup>

Provision is made for the protection of grand and petit jurors from corruption, intimidation, injury, etc.<sup>352</sup>

<sup>350</sup> Revised Statutes, section 819. Held in *United States v. Rose*, 6 Fed. Rep., 136, that the act of June 30, 1879 (21 Statutes at Large, p. 43), does not repeal section 804, Revised Statutes, and, therefore, when, from challenges or otherwise, there is not a petit jury to determine any cause, the court may direct the marshal to fill the panel from by-standers. Section 804 reads: "When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section." See *United States v. Loughery*, 13 Blatch., 267. See also sections 1031 and 4302. Section 1031 provides: "If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made." *United States v. Coppersmith*, 4 Fed. Rep., 198; *Georgia v. O'Grady*, 3 Woods's, 496; *United States v. Southmayd*, 6 Biss., 321.

<sup>351</sup> Revised Statutes, section 1033. *United States v. Insurgents*, 2 Dall., 335; *United States v. Wood*, 3 Wash., 440; *United States v. Stewart*, 2 Dall., 343.

<sup>352</sup> Revised Statutes, sections 5404, 5405, 5406 and 1980.

The courts of the United States have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have been usually granted in the courts of law.<sup>353</sup>

**§ 94. Laws of United States—Evidence—Witnesses—Production of Documents—Depositions—Restoration of Lost Records—Common Law—Equity and Admiralty.**—The security afforded by the CONSTITUTION to all persons charged with crime in the courts of the United States of being confronted with the witnesses against them, and of having compulsory process for obtaining witnesses in their favor, has been considered.<sup>354</sup> The provision of that instrument, touching the faith and credit to be given in each State to the public acts, records and judicial proceedings of every other State, and the manner in which Congress has seen fit to authorize the admission of such acts, records and proceedings in evidence, and the effect to be given thereto when so offered, has also been noticed.<sup>355</sup> We had occasion, too, in showing that the rules of evidence prescribed by State laws are binding upon the Federal courts in civil cases at common law, where the CONSTITUTION, treaties or statutes of the United States do not otherwise provide,<sup>356</sup> to refer to various matters of which the Federal courts take judicial notice,<sup>357</sup> and presumptions in which they indulge,<sup>358</sup> and to note, amongst other provisions of law, that which inhibits in the courts of the United

<sup>353</sup> Revised Statutes, section 726. *Clark v. Sohler*, 1 Wood & M., 368.

<sup>354</sup> See section 79, p. 246, *ante*.

<sup>355</sup> See section 82, p. 254, *ante*.

<sup>356</sup> In addition to the authorities already referred to (see section 69, p. 224, *ante*), it has been held that the statute of a State, permitting a comparison of writings for the purpose of determining hand-writing, has no effect upon criminal proceedings in the courts of the United States. *United States v. Jones*, 10 Fed. Rep., 469.

In *Bryant v. Leyland*, 6 Fed. Rep., 125, held that under the Federal Practice Act (Revised Statutes, section 914), interrogatories authorized by a State statute may be filed in a Federal Court, in an action at law, in lieu of a bill of discovery, and that such remedy is cumulative merely, and not adopted as a substitute for a bill of discovery; and further, that section 861, Revised Statutes, which declares the mode of proof in actions at common law shall be by oral testimony, does not refer to discovery, whether by bill or interrogatory.

<sup>357</sup> See p. 226, *ante*.

<sup>358</sup> See p. 229, *ante*.

States, in civil actions, the exclusion of any witness on account of color, or because he is a party to or interested in the issue tried, save that in actions by or against executors, administrators or guardians, in which a judgment may be rendered for or against them, neither party is allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the court.<sup>359</sup> Attention has also been given to what is evidence of the laws of the United States;<sup>360</sup> and in connection with the subject of civil rights, we brought to view the statutory right of all persons within the jurisdiction of the United States, in every State and Territory, to give evidence the same as white citizens.<sup>361</sup>

In addition to these, there remain to be considered other provisions of law. And first in importance, perhaps, are those which give to the accused the right of testifying in his own behalf,<sup>362</sup> and where he is not possessed of sufficient means to pay the fees of his witness, enables him to have them subpoenaed at the expense of the government.<sup>363</sup>

<sup>359</sup> Revised Statutes, section 858. See note 64, pp. 225 and 226, *ante*. See also *Lucas v. Brooks*, 18 Wall., 436; *Packet Company v. Clough*, 20 Wall., 528; *Insurance Company v. Schaefer*, 94 U. S., 457. *Cornett v. Williams*, 20 Wall., 126; *Good v. Martin*, 95 U. S., 90; *Green v. United States*, 9 Wall., 655; *Texas v. Chiles*, 21 Wall., 488; *Railroad Company v. Pollard*, 22 Wall., 341; *Eslava v. Mazange*, 1 Wood's, 623; *In re Campbell*, 3 Hughes, 276; *Lucas v. Brooks*, 18 Wall., 436; *Heath v. Erie Railway Company*, 9 Blatch., 316; *The Stranger*, 1 Brown, 281; *Robinson v. Mandell*, 3 Cliff., 169; *Munn v. Owens*, 2 Dill., 475.

As to clause disqualifying executors, administrators and guardians, see *Rice v. Martin*, 8 Fed. Rep., 476; *Rhode Island Hospital Trust Company v. Hazard*, 6 Fed. Rep., 119; *Page v. Burnstine*, 102 U. S., 664.

In *Eslava v. Mazange's Administrator*, 1 Wood's, 623, it was held by Mr. Justice Bradley, upon a motion to suppress the deposition of the complainant and his wife (the cause being in equity), that an *ex parte* order, obtained by complainant before process issued for his own examination as a witness, did not qualify him as such, on the ground that he was required by the court to testify. The authority given to the court to require parties to testify was to meet cases where it would be a great hardship not to do so.

<sup>360</sup> See p. 266, *ante*.

<sup>361</sup> See p. 272, *ante*.

<sup>362</sup> Act of March 16, 1878, 20 Statutes at Large, p. 30; 1 Supplement Revised Statutes, p. 312.

<sup>363</sup> Revised Statutes, section 878.

In civil causes, witnesses living within one hundred miles of the place where the court is held, whether living within or without the district, may be subpoenaed,<sup>364</sup> and witnesses duly served with subpoena, and tendered the per diem and mileage to which they are by law entitled, failing to obey the subpoena, may be attached for contempt.<sup>365</sup>

<sup>364</sup> Revised Statutes, section 876. *Patapsco Insurance Company v. Southgate*, 5 Pet., 604. See note 365, *infra*.

In *Russell v. Ashley*, Hamps., 546, the defendant objected to the item in the taxation of costs for the service of a subpoena on a witness who resided more than one hundred miles from the place of trial. The plaintiff had taken the deposition of the same witness before the service of the subpoena upon him. Johnson, J., in delivering the opinion, said: "Indeed, a witness residing more than one hundred miles from the place of trial is beyond the coercive power of a subpoena. The party may take his deposition, but can not compel him to attend at court and give oral testimony. This had been expressly held by the Supreme Court of the United States, in the case of the *Patapsco Insurance Company v. Southgate*, 5 Peters, 615. The party desiring his testimony has no right to issue a subpoena to coerce his attendance, and if he does, he must pay the costs incident thereto, and not throw them upon the other party."

If, by this, it is meant that a subpoena is limited *within the district* to one hundred miles from the place of holding the court, the doctrine announced is opposed by the case of *Dreskill v. Parish*, 5 McLean, 241, where it is said: "A subpoena runs throughout the district, without regard to the distance, the same as any other writ." And it has been held that a witness living more than one hundred miles from the place of trial, within the district, will be allowed his fees for attending, in pursuance of a subpoena. *In re Thomas*, 1 Dill., 420, note. In *Anonymous*, 5 Blatch., 134, it was held by Shipman, J., with the concurrence of Mr. Justice Nelson, that traveling fees to a witness were allowable only to the extent a subpoena would run, that is, for any distance within the district, but for not exceeding one hundred miles from the place of trial, unless the distance was wholly within the district. In some cases fees have been allowed witnesses living out of the district, and more than one hundred miles from the place of trial, who voluntarily attended at the instance of the parties. *Anderson v. Moe*, 1 Abb. U. S., 299; *Whipple v. Cumberland Cotton Company*, 3 Story, 84; *Hathaway v. Roach*, 2 Wood & M., 63. In *Woodruff v. Barney*, 1 Bond, 528, and *Sawyer v. Aultman & Taylor Manufacturing Company*, 5 Biss., 165, it is held that witness fees cannot be taxed in the Federal courts, unless the witness has been regularly subpoenaed.

<sup>365</sup> *In re Woodward*, 12 Bank, Reg., 297; *In re Thomas*, 1 Dill., 420. In *Henry v. Ricketts*, 1 Cranch C. C., 580, the defendant moved for a rule on one James Taylor to show cause why an attachment should not issue against him for a contempt in not obeying a summons to appear and testify as a witness. Taylor resided in Norfolk, Va., more than one hundred miles from the place of trial. The court, on hearing, refused to lay the rule, being of opinion that a witness residing more than one hun-



And if a witness, whose personal attendance is desired, be in prison, he may be brought up to testify under a *habeas corpus ad testificandum*; <sup>366</sup> and this, it seems, notwithstanding he may be under sentence or execution of a State court. <sup>367</sup>

dred miles from the place of trial could not be compelled to attend, and refused to issue a subpoena commanding the witness to appear before the mayor of Norfolk to testify; citing, in support of its ruling, section 30 of act of September 24, 1789, and section 6 of act of March 2, 1793. Whether an attachment will be issued against a witness who has been duly subpoenaed, and had his per diem and mileage tendered him, and who lives *within the district*, but more than one hundred miles from the place of trial, seems not to have been directly passed upon.

Whether a witness resides more than one hundred miles from place of trial is to be determined by actual distance. *Ex Parte Beebees*, 2 Wall., Jr., 127. If witness lives within one hundred miles, attachment may be sent and executed in another district. *United States v. Williams*, 4 Cranch C. C., 372.

The ordinary manner of procuring the personal attendance of witnesses is by subpoena, the power to issue which is derived from section 716, Revised Statutes United States, conferring upon the courts of the United States the authority "to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." *In re Shephard*, 3 Fed. Rep., 312. See sections 45 (p. 179), 41 (p. 172), and 29 (p. 147), *ante*. It is held in *In re Ellerbe*, 13 Fed. Rep., 530, that a refusal to obey a subpoena issued by a Federal court is an offense against the Federal government, within the meaning of section 1014, Revised Statutes of the United States; that where a Federal court orders the arrest of a witness charged with having failed to obey a subpoena issued by it, and duly served, and the witness departs into another district before he can be arrested, any judge of the United States, having jurisdiction in the district to which the witness has removed, may order his arrest and removal back to the district in which he is charged with the offense; and that in such cases the judge ordering the arrest of the witness cannot inquire into his guilt or innocence before ordering his removal; citing Revised Statutes, section 725; *Riggs v. Supervisors*, 1 Woolw., 377; *Ex Parte Kearney*, 7 Wheat., 38; *New Orleans v. Steamship Company*, 20 Wall., 387; *Dixon's Case*, 3 Opinions Attorney-General, 622; *Conger's Case*, 4 Opinions Attorney-General, 317; *Rowan & Wells' Case*, *Id.*, 456. See also authorities cited in note at end of case.

<sup>366</sup> Section 753, Revised Statutes of the United States, declares that "the writ of *habeas corpus* shall, in no case, extend to a prisoner in jail, unless," etc., \* \* "it is necessary to bring the prisoner into court to testify." In *Ex Parte Barnes*, 1 Sprague, 133, it was held that a commissioner of the circuit court has not the power to issue a writ of *habeas corpus* to take from jail a person committed by authority of the United States, and bring him before a commissioner, for the purpose of giving his deposition before such commissioner to be used in a cause pending in the district court; and it was questioned whether a judge of a court of the United States can exercise the power of issuing writs of *habeas corpus ad testificandum* in vacation, even for the purpose of bringing witnesses into court at the approaching session.

<sup>367</sup> *Ex Parte Dorr*, 3 How., 103.

The courts of the United States have authority, in the trial of actions at law, to require parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, where they might be compelled to produce the same by ordinary rules of proceeding in chancery.<sup>388</sup> They also have the power to issue writs

<sup>388</sup> Revised Statutes, section 724, reads: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

This section is not, strictly speaking, a substitute for a bill of discovery, though it lessens the necessity for their use. *Hylton v. Brown*, 1 Wash., 298.

The fifteenth section of the Judiciary Act, says Dillon, J., "refers alone to civil cases at common law, and provides that the courts of the United States may compel parties to produce papers and documents pertinent to the issue on trial, under circumstances such as a court of equity can compel the production of like papers and documents. The practice in equity is very well settled. Of course, when a party wants the production of a paper, document, or book, he must specify it with as much particularity as is practicable; he must state what it is; he must make a *prima facie* showing that it is in the possession of the other party, and that it is material. But this statute has no reference to this case; it was enacted to enable a court of common law to obtain books and papers from the parties. A court of equity has the power to compel the discovery and production of papers in virtue of its inherent and general jurisdiction." *United States v. Bahcock*, 3 Dill., 566. See also *Merchants' National Bank v. State National Bank*, 3 Cliff., 201; *Geyger v. Geyger*, 2 Dall., 332.

Under the laws of the United States, both the remedy by a bill of discovery and by an order to produce are given, and if a party chooses to go to the expense of both, the court cannot deprive him of one of them, unless it can clearly see that the other has been completely effectual, so that any further proceeding must be simply useless or intended to harass the other party. *Iasigi v. Brown*, 1 Curtis, 401.

Nor was it designed to supersede the practice at common law, which authorizes the use of parol or secondary evidence of the contents of a paper upon failure of a party to produce after notice. *Iasigi v. Brown*, 1 Curtis, 401; *Bass v. Steele*, 3 Wash., 381.

It attaches to the non-production of a paper ordered to be produced at the trial the penalty of a non-suit or default. *Iasigi v. Brown*, 1 Curtis, 401.

To obtain the benefits of the summary method for compelling the production of papers in actions at law, the party must bring himself within the provisions of the statute. The cause must be at issue. *Jacques v. Collins*, 2 Blatchf., 23. The language of the statute is, "In the trials of actions at law, the courts of the United States may," etc., but it is held that the production may be required before the trial.

of subpoena *duces tecum*, agreeable to the usages and principles of law,<sup>369</sup> and such writs are specially provided for where testimony is taken before a commissioner under a *dedimus potestatem*.<sup>370</sup> A subpoena *duces tecum* will not, however, be granted by a Federal court for

Triplett v. Bank of Washington, 3 Cr. C. C., 646; Central Bank v. Taylor, 2 Cranch C. C., 427; Iasigi v. Brown, 1 Curtis, 401. See also Hylton v. Brown, 1 Wash., 298.

And an application, by motion, or in some other form, must be made to the court for its order in the premises. The notice spoken of in the statute is merely a pre-

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<sup>369</sup> Revised Statutes, section 716. *In re Shepherd*, 3 Fed. Rep., 12. See sections 45 (p. 179), 41 (p. 172), and 29 (p. 147), *ante*.

*In re Shepherd*, 3 Fed. Rep., 12. Where copies of official papers, such as papers on file in the office of the headquarters of a department of the army, can be read in evidence, and the originals, if produced, would not serve a different purpose, a subpoena *duces tecum* will be set aside. *Corbett v. Gibson*, 16 Blatchf., 334. The papers or documents, the production of which is sought by the writ, are required to be stated or certified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that a witness may be able to know what is wanted of him, and to have the papers on the trial so that they can be used if the court shall then determine that they are competent and relevant evidence; and it is the duty of the person to whom the writ is directed to make reasonable search for the papers and documents required, if they are in his possession. *United States v. Babcock*, 3 Dill., 566.

<sup>370</sup> Revised Statutes, section 869, is as follows:

"When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing, or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties."

the original papers in a cause in a State court,<sup>371</sup> nor in a case of forfeitures and penalties, as one cannot in this way be compelled to furnish evidence to convict himself.<sup>372</sup>

The laws of the United States provide for four kinds of depositions

liminary proceeding to enable the party to bring before the court the motion for the order to produce; and when that motion is made the party called on has a right to be heard, and he is not bound to produce the books and papers called for until the court shall order him to produce them, and is in no default unless he refuses or neglects to obey the order. It is the failure to comply with the *order* of the court, and not the *notice*, which authorizes the judgment of non-suit or default. *Thompson v. Selden*, 20 How., 194; *Mays v. Carberry*, 2 Cranch C. C., 386; *Bank of United States v. Kurtz*, 2 Cranch C. C., 342; *McComber v. Clarks*, 3 Cranch C. C., 347; *Dunham v. Riley*, 4 Wash., 126; *Bass v. Steele*, 3 Wash., 381.

With respect to the form of the application, it is not necessary to follow the chancery precedents of bills of discovery. *Jacques v. Collins*, 2 Blatchf., 23. It may be by petition or motion, and should show that the paper exists and is in the control of the other party; that it is pertinent to the issue, and is such that a court of equity would compel its production. *Iasigi v. Brown*, 1 Curtis, 401; *Bass v. Steele*, 3 Wash. C. C., 381; *Finch v. Rikeman*, 2 Blatchf., 301. The documents or pieces of evidence sought for should be plainly designated (*Jacques v. Collins*, 2 Blatchf., 23), and in one case it is said that the party "must also give evidence of the control of the papers, for it will not do for him only to say what those contents are;" and that "the court will require reasonable proof of the possession and pertinency of the papers." *Bass v. Steele*, 3 Wash. C. C., 381. See also *Iasigi v. Brown*, 1 Curtis, 401. In *United States v. Twenty-eight Packages of Pins, Gilp.*, 306, it was held that an *ex parte* affidavit was sufficient to found an order for the production of books and papers under the statute.

When the production will subject the party to a forfeiture or penalty, it will not be ordered. *Finch v. Rikeman*, 2 Blatchf., 301. See also *United States v. Twenty-eight Packages of Pins, Gilp.*, 306.

For special provisions relating to the production of books, etc., under the revenue laws of the United States, see act of June 22, 1874, 18 Statutes at Large, p. 186; 1 Supplement Revised Statutes, p. 78.

In requiring the production of books or writings in evidence in actions at law, the Federal courts are not governed by State laws, but by the provisions of section 724, Revised Statutes. *Gregory v. Chicago, Milwaukee and St. Paul Railroad Company*, 10 Fed. Rep., 529.

<sup>371</sup> *Craig v. Richards*, 1 Cranch C. C., 84; *Dexter v. Sullivan*, 14 Law Rep., 455.

<sup>372</sup> *Johnson v. Donaldson*, 3 Fed. Rep., 22. In this case the plaintiff claimed to be the proprietor of a copyright of a chromo, and brought suit against the defendant for penalties and forfeitures, pursuant to section 4965, Revised Statutes. Plaintiff attempted, by a subpoena *duces tecum*, to compel defendant to produce his books of account, photographic plates, and copies of the printed chromos. The court refused to compel their production.

in civil causes—*de bene esse*,<sup>373</sup> under a *dedimus potestatem*,<sup>374</sup> in *perpetuam rei memoriam*,<sup>375</sup> and under letters rogatory.<sup>376</sup> The first (*de bene esse*) may be taken in any civil cause depending in a district or circuit court:—

1. Where the witness lives at a greater distance from the place of trial than one hundred miles.
2. Where the witness is bound on a voyage to sea.
3. Where the witness is about to go out of the United States.
4. Where the witness is about to go out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial.
5. Where the witness is ancient and infirm.<sup>377</sup>

<sup>373</sup>To examine a witness *de bene esse* is to examine him out of court, before the trial, subject to the contingency of his being able to attend the court at the trial. If he be unable to attend, such examination is good, and the deposition may be used in evidence on the trial, but if he be able to attend, the examination is of no validity, and he must be examined again at the trial in the usual way. *Burrill*.

<sup>374</sup>*Dedimus Potestatem*—"We have given power." The brief name of a *commission* to take testimony. Depositions *de bene esse* are taken on notice and not under commission. *Jones v. Oregon C. R. R. Co.*, 3 Sawy., 523.

<sup>375</sup>In perpetual memory of the matter; for the purpose of preserving a record of the matter. As applied to depositions, means, taken to preserve the testimony of the witness.

<sup>376</sup>The request which a court issues, founded on comity to a foreign tribunal, that it will cause the testimony of a witness residing within its jurisdiction to be taken and transmitted to the first court for use in a cause there, is called letters rogatory. *Abbotts L. Dict.*

<sup>377</sup>Sections 863 and 864, Revised Statutes, are as follows:

"SEC. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state

Where depositions are taken *de bene esse*, unless it appears to the satisfaction of the court that the witness is either (1) then dead, (2) or gone out of the United States, (3) or gone to a greater distance than one hundred miles from the place the court is sitting, (4) or is unable to travel and appear at court by reason of age, sickness, bodily infirmity, or imprisonment, they cannot be used in the cause.<sup>378</sup>

The second (under a *dedimus potestatem*) may be taken according to the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

"Sec. 864. Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent." *Harris v. Wall*, 7 How., 693; *Bell v. Morrison*, 1 Pet., 351; *Evans v. Eaton*, 7 Wheat., 356. *The Samuel*, 1. Wheat., 9.

IN EQUITY CASES.—It is held by Blatchford, C.-J., in an equity case, that "under sections 863 and 1750 of the Revised Statutes, depositions *de bene esse* in civil causes may be taken in a foreign country by any secretary of legation or consular officer. The mode of taking such depositions, under sections 863, 864 and 865, is by oral questions put at the time, if desired, and not necessarily by written interrogatories given to the officer before commencing the taking. It is the same mode provided for by the amendment to (equity) rule 67. *Bischoffsheim v. Baltzer*, 10 Fed. Rep., 1.

<sup>378</sup> Section 865, Revised Statutes, reads:

"Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause." *Nelson v. Woodruff*, 1 Black, 156; *The Roscins*, 1 Brown, 442; *Shankwicker v. Reading*, 4 McLean, 240; *Jones v. Neale*, 1 Hughes, 268.

common usage, by authority of any of the courts of the United States, where necessary in order to prevent a failure or delay of justice.<sup>379</sup>

The third (*in perpetuum rei memoriam*) may be taken on the order of any circuit court, upon application to it as a court of equity, according to the usages in chancery, where the depositions relate to any matters that may be cognizable in any court of the United States.<sup>380</sup>

<sup>379</sup> Sections 866 and 868, Revised Statutes, reads:

"SEC. 866. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatum* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuum rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States." *Jones v. Oregon Central Railroad Company*, 3 Sawy., 523; *Seargent v. Biddle*, 4 Wheat., 508; *Peters v. Prevost*, 1 Paine, 64; *Stein v. Bowman*, 13 Pet., 209; *Buddicum v. Kirk*, 3 Cranch C. C., 293.

"SEC. 868. When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory, shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court." *In re Samuel Glasser*, 2 B. R., 398. A witness cannot be compelled to attend at any place out of the county of his residence, nor more than forty miles from place of residence. Revised Statutes, section 870.

IN EQUITY CASES.—It is held by Blatchford, C. J., that under section 866, Revised Statutes, depositions may be taken under a *dedimus potestatum*, according to "common usage" now as at any time hitherto, and that the words "common usage," in regard to suits in equity, refer to the practice in courts of equity. *Bischoffsheim v. Baltzer*, 10 Fed. Rep., 1. *United States v. Parrott*, 1 McC., 447.

<sup>380</sup> See section 866, Revised Statutes, set out in preceding note. The succeeding section, 867, reads: "Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuum rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof." *Gould v. Gould*, 3 Story, 516.

The effect of the provision of section 867, Revised Statutes, is not to exclude testimony taken under section 866, but to allow the courts of the United States to admit in evidence testimony perpetuated according to State law. Testimony perpetuated by a Circuit Court of the United States, under section 866, is admissible in evi-

The fourth (under letters rogatory) may be taken of witnesses in foreign countries.<sup>381</sup>

When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, such defect may be supplied upon an order of court.<sup>382</sup> Provision is also made for supplying the loss of official returns or other official papers of the

dence according to the usages and practice of courts of the United States, and not by virtue of section 867.

*New York and Baltimore Coffee Polishing Company v. New York Coffee Polishing Company*, 11 Fed. Rep., 813.

<sup>381</sup> Section 875, Revised Statutes, reads: "When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same."

<sup>382</sup> Sections 899, 900 and 901, Revised Statutes, are as follows:

"SEC. 899. When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had.

"SEC. 900. When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed



United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law,<sup>383</sup> and for supplying the loss of any files, papers, or records of any court of the United States.<sup>384</sup>

By section 861, Revised Statutes, it is provided: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."<sup>385</sup> And by section 862, that "The mode of proof in causes of equity, and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."<sup>386</sup>

record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served, as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed.

SEC. 901. When any cause has been removed to the Supreme Court, and the original thereof is afterwards lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

<sup>383</sup> Act of January 31, 1879; 20 Statutes at Large, p. 277; 1 Supplement Revised Statutes, p. 403.

<sup>384</sup> See act of January 31, 1879, referred to in preceding note (383).

<sup>385</sup> The cases to which the words, "except as hereinafter specially provided," refer, are evidently those provided for in subsequent sections, authorizing the taking of depositions *de bene esse*, and under a *dedimus potestatem*, and in *perpetuam rei memoriam*.

Held, in *Bryant v. Leyland*, 6 Fed. Rep., 125, that, under the Federal practice act, interrogatories authorized by a State statute might be filed in a Federal court, in an action at law, in lieu of a bill of discovery; that such remedy was cumulative, and not adopted as a substitute for a bill of discovery, and that section 861 of the Revised Statutes did not refer to discovery, whether by bill or interrogatory. See, also, *Ex Parte Boyd*, 105 U. S., 647.

Held, in *Beardsley v. Littell*, 14 Blatch., 102, that a defendant can not, before the trial, be examined as a witness for the plaintiff out of court, although such examination is authorized by the law of the State in which the Federal court is sitting.

<sup>386</sup> It is held in *Blease v. Garlington*, 92 U. S., 1, that so much of the judiciary act of 1789 (section 30, p. 22, *ante*), as relates to the oral examination of witnesses in open court, was not expressly repealed until the adoption of section 862 of the Revised Statutes, and that while the circuit courts, sitting in equity, might, perhaps, in their discretion, under the operation of existing equity rules, permit the examina-

As to the *competency of witnesses*, the *laws of the State* in which the court is held are rules of decision in the courts of the United States in actions at *common law*, and in *equity and admiralty*, except as to the non-exclusion of witnesses on account of color and interest.<sup>387</sup>

State laws are also recognized as rules of decision by the Federal courts sitting in equity in matters other than those pertaining to the competency of witnesses. Thus, State laws declaring the effect as evidence of certain instruments,<sup>388</sup> and State statutes of frauds, requiring written evidence of certain agreements,<sup>389</sup> have been followed in equity causes.

**§ 95. Law of Nations.**—The law of nations must, in some cases, furnish the rule by which the courts of the United States are to be guided in adjudicating upon questions affecting the rights of persons and of property.<sup>390</sup>

tion of witnesses, orally, in open court upon the hearing, they were not by law required to do so; and further, that the practice act of June, 1872 (Revised Statutes, section 914), had no application to causes in equity.

<sup>387</sup> See note 94, pp. 225, 226. Prior to passage of act of July 6, 1862 (12 Statutes at Large, p. 588; Revised Statutes, section 858), the laws of the State, by virtue of section 34 of the judiciary act of 1798 (p. 25, *ante*; Revised Statutes, section 721), governed the competency of witnesses in the courts of the United States, in trials at common law, but not in equity or admiralty. The object of the act of July 6, 1862, was to produce uniformity in this respect in trials at common law, equity and admiralty. *United States v. Brown*, 1 Sawy., 531. See, also, *Segee v. Thomas*, 3 Blatch., 11; *Blanchard v. Sprague*, 1 Cliff., 288. When, touching the competency of a witness, there is a conflict between a law of the State and an act of Congress, the latter must govern the courts of the United States. *King v. Worthington*, 104 U. S., 44.

<sup>388</sup> In *Callanan v. Hurley*, 93 U. S., 387, which was an equity cause, it was held that a treasurer's deed, for lands sold for delinquent taxes in the State of Iowa, if substantially regular in form, was, under the statute of that State, at least *prima facie* evidence that a sale was made. See, also, *Dick v. Balch*, 8 Pet., 30; *Lewis v. Baird*, 3 McLean, 56.

<sup>389</sup> *Barry v. Coombe*, 1 Pet., 640. See, also, *Purcell v. Miner*, 4 Wall., 513; *Lloyd v. Fulton*, 91 U. S., 479; *Robinson v. Elliott*, 22 Wall., 513; *Swain v. Scarumens*, 9 Wall, 254.

<sup>390</sup> Congress is given power by article 1, section 3, clause 10, of the Constitution, "To define and punish piracies and felonies committed on the high seas, and offenses against the *law of nations*." *United States v. Smith*, 5 Wheat., 153; *United States v. Pirates*, 5 Wheat., 184; *The Marianna Flora*, 11 Wheat., 1; *United States v. Brig Malek Adhel*, 2 How., 210; *United States v. Baker*, 5 Blatch., 6.

The jurisdiction conferred upon the Supreme Court of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, is declared to be such "as a court of law can have consistently with the *law of nations*." <sup>391</sup>

And with respect to suits by aliens for torts only, and suits which may be brought against consuls and vice-consuls in the district court, the *law of nations* is expressly referred to. <sup>392</sup>

Provision is also made for penalties for violence to the person of a public minister contrary to the *law of nations*. <sup>393</sup>

In passing upon the rights, duties and disabilities of aliens domiciled in the United States, in the absence of controlling treaty stipulations, the law of nations, or international law, may be looked to as a guide. <sup>394</sup> Not that they control the rights of foreigners to immovable property, for the authority to do this resides primarily in the States where the property is situated. <sup>395</sup>

"The law of nations," says Mr. Chief Justice Marshall, "is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized and commercial States through Europe and America. This law is in part unwritten and in part conventional. To ascertain that which is written, we resort to the great principles of reason and justice; but as these principles will be differently understood by different nations under different circumstances, we consider them as being in some degree fixed and rendered

<sup>391</sup> Revised Statutes, section 687. See, also, section 16, p. 34, *ante*.

<sup>392</sup> Revised Statutes, section 653, subdivisions 16 and 17. See, also, section 42, p. 175, *ante*.

<sup>393</sup> Revised Statutes, section 4062, *et seq.* The law of nations identifies the property of a foreign minister, attached to his person or in his use, with his person. *United States v. Hand*, 2 Wash., 435. See, also, *United States v. Benner*, 1 Baldw., 234; *United States v. Liddle*, 2 Wash., 205; *United States v. LaFontaine*, 4 Cranch C. C., 173; *Ex Parte Cabrera*, 1 Wash., 232; *United States v. Jeffers*, 4 Cranch C. C., 704; *United States v. Ortega*, 11 Wheat., 467.

<sup>394</sup> *Carlisle v. United States*, 16 Wall., 147; *Radich v. Hutchins*, 95 U. S., 210; *United States v. Repentigny*, 5 Wall., 211; *Taylor v. Benham*, 5 How., 233; *Shanks v. Dupont*, 3 Pet., 242; *Fairfax v. Hunter*, 7 Cranch, 603.

<sup>395</sup> *Mager v. Grima*, 8 How., 490; *Hauenstein v. Lynham*, 100 U. S., 483; *Airhart v. Massieu*, 98 U. S., 491.

stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.”<sup>396</sup>

And in another case it is said by the same distinguished judge: “That the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations or the general doctrines of national law.”<sup>397</sup>

The doctrine has been repeatedly affirmed that, according to the law of nations, rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect, and whether in writing or evidenced by the usage and customs of the conquered or ceded country, the laws thereof continue in force till altered by the new sovereign.<sup>398</sup>

<sup>396</sup> *Thirty Hogshead of Sugar v. Boyle*, 9 Cranch, 191. “The law of prize,” it is said, “is part of the law of nations.” *The Rapid*, 8 Cranch, 155. See, as to capture and prize, *Jecker v. Montgomery*, 13 How., 498; *The Commercen*, 1 Wheat., 382; *Carrington v. Merchants’ Insurance Company*, 8 Pet., 495; *The Bermuda*, 3 Wall., 514; *The Peterhoff*, 5 Wall., 28; *United States v. Diekelman*, 92 U. S., 520; *The Atalanta*, 3 Wheat., 409; *The William Bagaley*, 5 Wall., 377; *Schooner Exchange v. McFadden*, 7 Cranch, 116; *The Schooner Rapid*, 1 Gallis., 295; *Talbot v. Janson*, 3 Dall., 133; *The Neride*, 9 Cranch, 388; *The Santissima Trinidad*, 7 Wheat., 283.

<sup>397</sup> *Talbot v. Seeman*, 1 Cranch, 1. See also, *Murray v. The Charming Betsey*, 2 Cranch, 64.

<sup>398</sup> *Strother v. Lucas*, 12 Pet., 410; *Mitchell v. United States*, 9 Pet., 711; *Soulard v. United States*, 4 Pet., 511; *Korn v. Mutual Assurance Society*, 6 Cranch, 192.

## CHAPTER IV.

LEGAL AND EQUITABLE RIGHTS DISTINGUISHED, AND  
HEREIN OF THE RULE WHICH CONFINES LEGAL  
REMEDIES TO THE LAW SIDE AND EQUITABLE REME-  
DIES TO THE EQUITY SIDE OF THE COURT, AND OF  
THE EFFECT OF STATE LAWS AND PRACTICE THEREON.

§ 96. Preliminary Observations—Rights may Emanate from one Source and Jurisdiction from Another—Uniformity, etc.—Having shown in the outset that *law* and *equity* are recognized and distinguished in the CONSTITUTION and laws of the United States; having considered the nature and general principles of Federal jurisdiction, and classified and enumerated the causes of which the several courts of the United States have cognizance, and having indicated the source of the legal and equitable rights to be adjudicated in said courts, it is our purpose, in this chapter, to distinguish such rights, to treat of the rule which confines legal remedies to the law side, and equitable remedies to the equity side of the court, and to note the effect of State laws and practice thereon.

As a matter of first importance in overcoming the difficulties of the task before us, and in preventing that confusion of ideas, otherwise likely to ensue, we must keep constantly in mind the difference between *primary* and *remedial* rights, and between the *right* and the *jurisdiction* to hear and determine the right.<sup>399</sup>

<sup>399</sup> Professor Pomeroy, in his recent and valuable work on Equity Jurisprudence, vol. 1, section 91, says:

"Primary and remedial rights and duties stand towards each other in the following relations: Every command or rule of the private civil law creates a primary right in one individual, and a primary duty corresponding thereto resting upon another person or number of persons. These rights and duties are, of course, innumerable

It is only in this way we can form correct notions of the *law* and *equity* jurisdiction of the Federal courts, and understand many of the decisions in relation thereto.

It has been frequently asserted, that the equity jurisdiction and powers of the courts of the United States are uniform throughout all the States of the Union, and that the rule of decision is the same in all.<sup>400</sup> Does this mean uniformity of *right*, as well as of *jurisdiction*?

It is unquestionably true that the power to hear and determine cases in *law* and *equity*, distinguishing between them, is derived from

in their variety, nature, and extent. If a person, upon whom a primary duty rests towards another, fails to perform that duty, and thereby violates the other's primary right, there at once arise the remedial right and duty. The one whose primary right has been violated immediately acquires a secondary right to obtain an appropriate remedy from the wrong-doer, while the wrong-doer himself becomes subjected to the secondary duty of giving or suffering such remedy. It is the function and object of courts, both of law and of equity, to directly enforce these remedial rights and duties by conferring the remedies adapted to the injury, and thus to indirectly maintain and preserve inviolate the primary rights and duties of the litigant parties. It is plain from this analysis that the nature and extent of remedial rights and duties, and of the remedies themselves, must depend upon two distinct factors taken in combination, namely, the nature and extent of the primary rights which are violated, and the nature and extent of the wrongs in and by which the violation is effected. The same primary right may be broken by many kinds of wrong-doing; and the same wrongful act or default may invade many different rights. The wrongs which are breaches of primary rights may be either positive acts of commission, or negative omissions; their variety, form, and nature are practically unlimited," etc.

<sup>400</sup> *Boyle v. Zacharia*, 6 Pet., 648.

In *Neves v. Scott*, 13 How., 268, Mr. Justice Curtis, speaking for the court, says (p. 272):

"Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this [the Supreme] court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable thereto. These principles may make a part of a law of a State, or they may have been modified by its legislation or usage, or they may have never existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States the equity law recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and, upon appeal, by this court."

See also *Noonan v. Lee*, 2 Black, 499; *Payne v. Hook*, 7 Wall., 425 (p. 430), citing *Hyde v. Stone*, 20 How., 175; *Suydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly's Administrators*, 18 How., 503.

the CONSTITUTION and laws of the United States, and that the courts of the United States have no jurisdiction except such as is conferred by such CONSTITUTION and laws.<sup>401</sup> But it is not true that the CONSTITUTION and laws of the United States, or the common law, are to be looked to as the sources of all the primary rights upon which this jurisdiction is to act; for, as will be abundantly shown hereafter, the Federal courts, in exercising legal and equitable jurisdiction, deal most largely with rights conferred by State laws, giving effect to such rights according to their varying and dissimilar natures, generally conforming in cases at law to the practice and procedure of the State courts, and even in equity cases, not unfrequently enforcing the remedies given by State statutes. Hence, the importance, as observed in the preceding chapter, of attending to the source of a right; for the law which gives it birth, and in which it lives, moves and has its being, often so inheres in, and becomes a part of, the right itself, as of necessity, notwithstanding the jurisdiction to enforce it may emanate from another source, to control, or give shape and form to the remedies employed for its conservation and enforcement.<sup>402</sup>

Let it then be borne in mind in what is to follow, that complete uniformity as to subjects, matter and extent of jurisdiction, is not to be looked for; and that we are not to expect, because in one State a certain legal or equitable primary right is recognized and enforced, that the same right, by virtue of some all-pervading principle governing the courts of the United States, will be enforced in every other State.

**§ 97. Rights, Primary and Remediable, Legal and Equitable—Common Law Classification—Right and Remedy Distinguished.**—From what has been said in the preceding section, it is apparent that any attempt to trace the distinction between law and equity, as recognized and enforced in the courts of the United States, which overlooks the classification of rights into *primary* and *remedial*, must prove unsatisfactory. And this, notwith-

<sup>401</sup> See section 9, p. 39, *ante*.

<sup>402</sup> See p. 191, *ante*.

standing the difficulty, in some cases, of so drawing the line, as to distinguish between that which should constitute a rule of property or of decision, and that which properly belongs to the domain of mere remedy. When we speak of legal primary rights as being conferred by the rules of law, and equitable primary rights as being conferred by the rules of equity, we have in view law, or *common law*, and *equity*, as distinguished and defined in that country from which we derive our knowledge of legal and equitable principles. Not that the right must be derived from the common law, but that in its *classification* as legal or equitable, we are guided by common law principles and definitions. Whether, in a given case, the right exists, or does not exist, and whether, in its essential features, it is a legal or an equitable, right may depend, not upon the common law, but upon the laws of the United States, the laws of former governments, and the laws of the several States. For there are many primary rights constantly recognized and enforced in the Federal and State courts, which could not, in the nature of things, have been known to the judicature of the mother country. And so, on the other hand, rights given by the English law may never have been adopted in the United States, or, if adopted, may have been abrogated. Upon this point, an opinion delivered by Mr. Chief Justice Taney on the circuit is instructive.<sup>403</sup> A citizen of Maryland made a bequest to an educational society, an unincorporated and voluntary association of individuals, to take in succession. On a bill filed in the United States Circuit Court in that State to enforce the bequest, it was held void, for the reason that it was not sanctioned by the laws of the State. "It is undoubtedly true," said the learned Chief Justice, "as contended for in the argument of the complainant, in regard to equitable rights,

<sup>403</sup> *Meade v. Beale*, Taney's Dec., 339.

*Bowen v. Chase*, 94 U. S., 812, was a suit in equity, in which the effect of the laws of New York upon estates created by trusts is considered. In *Jones v. Habersham*, decided by the United States Supreme Court, March 5, 1883, 2 S. C. Rep., 336, the subject of charitable devises and bequests, as recognized in the State of Georgia, is discussed. Laws of Virginia followed with reference to charitable bequests in *Cain v. Gibboney*, 101 U. S., 362.



that the power of the courts of chancery of the United States is, under the CONSTITUTION, to be regulated by the laws of the English chancery; that is to say, the distinction between law and equity, as recognized in the jurisprudence of England, is to be observed in the courts of the United States, in administering the remedy for an existing right. The rule applies to the *remedy* and not the *right*, and it does not follow, that every right given by the English law, and which, at the time the CONSTITUTION was adopted, might have been enforced in the court of chancery, can also be enforced in a court of the United States. The right must be given by the law of the State, or of the United States. It is the form of remedy for which the CONSTITUTION provides, and if the complainant has no right, the Circuit Court, sitting as a court of chancery, has nothing to remedy in any form of proceeding. In the case before the court the question is: is the bequest which the complainants claim a valid one by the laws of Maryland? It is a question which in its nature necessarily depends upon the laws of the respective States. Some of the States sanction devises of this description, some do not; and undoubtedly it depends upon every State to determine for itself, to whom, and in what form, and by what instrument, any property within its borders may pass by devise or otherwise. The Court of Appeals in Maryland have decided that a bequest like this is void by the laws of the State, and passes no right to any one. This court is bound to respect this as the law of the State; and if there is no right vested in the complainants by the bequest, this court cannot create one. There is, therefore, neither an equitable nor legal title upon which the powers of a court of the United States can be called into action, either as a court of equity or of law, in behalf of these complainants.<sup>17 404</sup>

<sup>404</sup> The case of *Lorman v. Clark*, 2 McLean, 568, is well worthy a careful reading. A bill was filed in equity to reach certain equitable interests, choses in action, and other property, which the complainants were not able to discover and reach by execution at law. It was attempted to sustain the bill under the statutes of Michigan, which authorized a bill in chancery in such cases, and on general chancery principles. The bill was demurred to. After adverting to the equity powers of the courts of the United States under the Constitution and laws thereof, the court say:

§ 98. Further as to Difference between Right and Remedy—**Brine v. Insurance Company**.—The case of *Brine v. Insurance Company*,<sup>405</sup> decided by the Supreme Court of the United States in 1877, and since several times affirmed,<sup>406</sup> is a lead-

"It is argued that, in the exercise of the powers thus given and defined, we must look to the settled principles of an equitable jurisdiction in England; *and that no relief can here be given which could not be given in that country*. And that what a Federal court of chancery may do in one State it may do in another. That its jurisdiction not being derived from the laws of a State, its powers are in no respect influenced by such laws. That if a different rule were to prevail, the court would lose the national character which was intended to be given to it, by its organization under the laws of the Union.

"The judiciary of the United States constitutes a co-ordinate and independent branch of the government; and its powers are co-extensive with the laws. It was designed, undoubtedly, to secure a uniform construction and enforcement of the laws of the Union. And in this respect, in all the States, the rule of decision is unvaried. But the Federal court has jurisdiction between citizens of different States, as well as in cases arising under the laws of the United States. And where controversies are brought before it, which do not arise under the laws of the Union, by what law are they to be determined? The law of the contract is the law of the place where it was made and was to be executed. There is no unwritten or common law of the

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<sup>405</sup> 96 U. S., 627.

2 Sup. Ct. Rep., pp. 241, 243. In *Connecticut Mutual Life Insurance Company v. Cushman*, decided March 5, 1883. 2 Sup. Ct. Rep., 236, the same law of Illinois, relating to the redemption of mortgaged property from sales under decree of the Federal court, by the Supreme Court of the United States, was examined. It seems that the circuit court, after the decision in *Bowie v. Insurance Company*, adopted certain definite rules in relation to redemptions from sales under its own decrees. These rules appear in a note to the opinion. After stating the nature of the decree rendered, the court say:

"It will have been observed that the rules established by the Federal court differ from the provisions of the local statutes in this: that by the former the redemption money in all cases is required to be paid to the holder of the certificate *or to the clerk of the court*, whereas by the latter, in the case of redemption by a judgment creditor, the money must be paid *to the officer having the execution*. In no case do the rules of the Federal court provide for payment either to the master or other officer who conducted the decretal sale, or to the officer holding the execution of the judgment creditor.

"However this difference may be regarded in the courts of Illinois when adminis-

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<sup>406</sup> *Allis v. Insurance Company*, 97 U. S., 144; *Orvis v. Powell*, 98 U. S., 176; *Swift v. Smith*, 102 U. S., 112; see also *Hammock v. Loan and Trust Company*, 105 U. S., 77; *Burley v. Flint*, 105 U. S., 247; *Chicago and V. R. R. Co. v. Fosick*, 106 U. S., 47; and *Mason v. Northwestern Insurance Company*, 106 U. S., 163.

ing case on the difference between a law which confers a substantial right and one which relates merely to the form or mode of securing the right.

The Hartford Fire Insurance Company filed a bill in chancery in Union. This rule of action is found in the different States, as it may have been adopted and modified by legislation, and a course of judicial decisions. The rule of decision, then, must be found in the local law, written or unwritten. No foreign principle attaches to the Federal court when exercising its powers within a State. It gives effect to the local law, under which the contract was made, or by virtue of which the right is asserted. And this independently of any act of Congress adopting the modes of proceedings, at common law, of the State courts. And the principle applies as well to proceedings in chancery as at law.

"The term jurisdiction is often used, not very appropriately, more in reference to the subject matter of the contract, or right set up, than to the capacity of the court. The capacity of the Federal court, for the exercise of chancery powers, is received from the laws of the Union. It is not dependent for this, in any degree, on the local law. But these powers are exercised in all cases where the contract or right comes appropriately under them.

"If a right exist within a State which cannot be enforced at law, and which properly belongs to a chancery jurisdiction, there can be no doubt that relief may be given by the Federal court. And it is immaterial whether a similar right has come under the action of a court of chancery in this country or in England. The right may be new. It may originate under a local statute or usage, and exist nowhere else. But this constitutes no objection to its enforcement. The inquiry is, is there

tering the statutes by which they are created and their jurisdiction defined and limited (*Littler v. People*, etc., 43 Ill., 188; *Stone v. Gardner*, 20 Ill., 309; *Durley v. Davis*, 69 Ill., 134), we entertain no doubt of the power of the Federal court to adopt its own modes or methods for the enforcement of the right of redemption given by the local law. The substantial right given, first, to mortgagors, their representatives, and grantees, and then to the judgment creditors of such mortgagors or their grantees, was to redeem the property sold within the time specified. Whether the redemption is by the one or the other class, the money is for the benefit of the purchaser at the decretal sale. When the amount going to him is *secured* by payment into the hands of some responsible officer, the object of the law, both as respects the purchaser at the decretal sale and the party redeeming, is fully attained. Redemption is effected when, by payment of the redemption money into proper hands, the purchase at the decretal sale is annulled, and the way opened for another sale. The Federal court, as indicated by its rules, preferred that the money, if not paid directly to the purchaser, should, by payment through its clerk, come directly under its control for the benefit of the purchaser. Where the sale of mortgaged premises is under a decree of the Federal court, and the execution of the judgment creditor, who seeks to redeem, is from a State court, there is an evident propriety in requiring the money going to the purchaser at the decretal sale to be paid through the clerk of the Federal court into its registry. The necessity for

the Circuit Court of the United States in Illinois, to foreclose a mortgage in the form of a deed of trust on a lot in Chicago. When the deed was made, the statute of Illinois allowed in such cases one year after sale for redemption by the debtor, and three months after that

no adequate relief at law, and does the right come within the powers of a court of chancery?

"Now, can it be said that, in a case like this, the jurisdiction of the court is derived from the local law? As in all other cases, which do not arise under the laws of the Union, the local law governs the contract or right, but the power to act on it is derived from the laws of the Union.

"The circuit courts of the United States have a general common law jurisdiction in a State. Their powers of common law and chancery are alike derived from the laws of the Union. For the laws of a State, and the modes of proceeding of its courts, which form a rule for the Federal court, at law, in the exercise of its jurisdiction, are in force only by reason of their adoption by act of Congress.

"Now, in the exercise of this common law jurisdiction, can it be objected that the right set up in the declaration is new, and has never before been asserted? Is not the proper inquiry, whether the right be a legal one, and, if it is, the action may be sustained? And if, in such a case, the plaintiff shall fail to establish his right by proof, is the failure attributable to a want of jurisdiction in the court? The jurisdiction to afford an ample remedy, at common law, is clear, but the case for the action of the court must be made out by the evidence. The subject matter, then, on which the court acts, is altogether distinct from its jurisdictional powers. The one is the contract, the other the powers by which it is enforced. The contract originates under, and is governed by, the local law; the jurisdiction is derived from the laws of the Union. And this view is applicable as well to the chancery as to the common law powers of the circuit court."

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such a regulation is not so urgent where the judgment creditor's execution is from the Federal court; but we perceive no objection to extending the regulation to that class of cases. Under the operation of the rules in question, the records of the Federal court will, in all cases, show whether the right of the purchaser to a deed has been defeated by redemption. Can it be said that the mode prescribed by the Federal court for securing the money going to the purchaser impairs his substantial rights? Is he less secure than he would be if the money is paid to the officer having the execution? Clearly not. The substantial right given by the statute to the purchaser is that the redemption money be secured to him before the benefit of his purchase is taken away, and the substantial right given to the party redeeming is that the redemption becomes complete and effectual upon his payment of the required amount. The particular mode in which the money is paid or secured by the latter for the benefit of the former is not of the substance of the rights of either. The mode or manner of payment belongs, so far as the Federal court is concerned, to the domain of practice, the power to regulate which, in harmony with the laws of the United States and the rules of this court, as might be necessary and con-

by any judgment creditor of the debtor, making fifteen months before the purchaser had the right to a deed and to possession. A final decree was made which ascertained the sum due on the mortgage, and allowed the defendants one hundred days to pay it. If not paid in that time, the special master was ordered to sell the land for cash, in accordance with the course and practice of the court, and after retaining his commissions and paying the costs of the proceedings, deposit the remainder with the clerk, together with his report, to abide the further order of the court, thus making no provision for, but, by its terms, cutting off and defeating, the right of redemption as given by the Illinois statute. This action of the court below was assigned as error. We extract from the opinion of the court on this point, as follows:

"It is said by counsel for the appellant that the statutes of Illinois allow one year after sale, in such a case as the present, for redemption by the debtor, and three months after that by any judgment creditor of the debtor, making fifteen months before the purchaser has a right to his deed and to possession. It is assigned for error

venient for the administration of justice, is expressly given by statute to the circuit courts. (Revised Statutes, section 918.)

"In the conclusions thus indicated, we are only giving effect to former decisions. In *Brine v. Insurance Company*, *supra*, it was, as we have seen, distinctly ruled, touching these local statutes, that the Federal court—preserving substantially the right of redemption—could pursue its own forms and modes for securing such right. The same doctrine, in effect, is announced in *Allis v. Insurance Company*, 97 U. S., 144. That case arose under a statute of Minnesota which allowed the defendant in a foreclosure proceeding to redeem within twelve months after the *confirmation* of the sale. The decree ordered the master, on making sale, to deliver to the purchaser a certificate stating that unless the property be redeemed within twelve months after the *sale*, he would be entitled to a deed. This departure from the letter of the statute was held not to be material, since substantial effect was given to the right to redeem within one year. The court said: 'In the State courts, where the practice undoubtedly is to report the sale at once for confirmation, the time begins to run from that confirmation. But if, in the Federal court, the practice is to make the final confirmation and deed at the same time, it is a necessity that the time allowed for redemption shall precede the deed of confirmation. There is here a substantial recognition of the right to redeem within twelve months.' It results that the objection taken to the rules established by the court below must be overruled."

that this decree not only makes no provision for such redemption, but, by its terms, cuts off and defeats that right." \* \* \* \*

After quoting the statutes of Illinois<sup>407</sup> in force on the subject, the opinion proceeds: "It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the circuit courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale, on the rights acquired by the purchaser and those of the mortgagor and his subsequent grantees, are also mere matters of practice, to be regulated by the rules of the court as found in the sources we have mentioned. On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by

<sup>407</sup> The statutes referred to are as follows: "It shall be lawful for any defendant, his heirs, executors or grantees, whose land shall have been sold by virtue of any execution, within twelve months from such sale, to redeem such land by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff or other officer who sold the same for the benefit of such purchaser, the sum of money paid on the purchase thereof, together with interest thereon at the rate of ten per cent per annum from the time of such sale; and on such sum being paid as aforesaid, the sale and certificate shall be null and void."

"In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity, for the sale of mortgage lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantees, to redeem the same in the manner provided in this chapter for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such decree in the same manner as is prescribed for the redemption of lands sold on execution issued upon judgments at common law."

which the title to real property is transferred, whether by deed, by will, or by judicial proceedings, are subject to, and may be governed by, the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract. And that all the laws of a State existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from State control of the chancery practice of the Federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition, that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form.

"Let us see if the statutes of Illinois on this subject do confer positive and substantial rights in this matter. It is not denied that in suits for foreclosure in the courts of that State the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts. Nor is it pretended that this court, or any other Federal court, can in such case review a decree of the State court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, ad-

minister a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right.<sup>408</sup> Of the soundness of the first proposition

<sup>408</sup> Citing *Olcott v. Brynum*, 17 Wall., 44; *Ex Parte McNeil*, 13 Wall., 236.

We refer in this note to some of the cases illustrating the rule that courts of equity will regard as rules of decision State laws conferring substantial rights. The law of Louisiana making it the duty of a party who will rescind a contract by reason of the failure of the other party to perform it, to return to the latter what he has received from him, so as to put him in the same situation in which he was before, enforced in an equity suit. *Gay v. Alter*, 102 U. S., 79.

Equity, as well as law, will protect homestead rights secured by Constitution of State. *Lanahan v. Sears*, 102 U. S., 318.

The City Council of Toledo, Ohio, under authority of the laws of that State, directed certain improvements to be made, and contracted with certain persons to do the work, the law declaring that the expense of doing the work should be a lien upon the property. The contractor, who was a citizen of another State, filed a bill on the equity side of the United States circuit court in that State to enforce this lien, and the jurisdiction was sustained. *Fitch v. Creighton*, 24 How., 159.

See also *Canal Company v. Gordon*, 6 Wall., 561, where lien given by State law to persons performing labor and furnishing material, etc., was enforced in equity.

Although by general law, as well as local law, of Louisiana, a will must be proved before title can be set up under it, yet a court of equity can so far exercise jurisdiction as to compel defendants to answer touching a will alleged to be spoliated. The exercise of chancery jurisdiction by the circuit court of the United States, sitting in Louisiana, does not introduce any new or foreign principle. It is only a change in the mode of redressing wrongs and protecting rights. *Gaines v. Chew*, 2 How., 619.

Owing to the peculiar state of title to land in Kentucky, a senior patent being in many cases issued on the junior title, and it being a rule in the courts of law in that State not to look beyond the patent, the principle became settled that courts of equity would sustain a bill brought for the purpose of establishing the prior title by entry, and of obtaining a conveyance from the person holding under a senior patent issued on a junior entry; and the courts of the United States sitting in that State have conformed to this practice and adopted the principle. *Finley v. Williams*, 9 Cranch, 164.

Under the law of Louisiana, as settled and uniformly applied by the courts of that State, a judgment creditor was not permitted to treat a conveyance from the defendant in the judgment made by authentic act, or in pursuance of the judicial sale of the succession by the probate judge, as null and void, and to seize and sell all property which had thus been passed to the vendee, it being required that he should bring an action to set the alienation aside and succeed in the same before he could levy his execution. Referring to this rule of law in that State, the court speak of it (p. 166) merely as a rule of practice or mode of proceeding in the enforcement of



of the appellant, it would seem there can, under the decisions of this court, be little doubt. The earliest utterance of the court on the subject is found in the case of the United States v. Crosby (7 Cranch, 115), in which this explicit language is used : 'The court entertain

civil rights which would not be binding upon Federal courts, and not as a rule of property that affected the title and estate of the vendee, and which, therefore, could not be dispensed with without disturbing one of the securities upon which the rights of property depended. Ford v. Douglas, 5 How., 143.

Where statute provides mode of making land of decedent liable for his debts, and this is not followed, relief cannot be had in a court of equity. Springfield v. Hurt, 15 Fed. Rep., 307.

Where the Legislature creates a city, carving it out of a region previously a town only, and enacts that all bonds which had been previously issued by the town should be paid, when the same fell due, by the *city and town*, in the same proportions as if said town and city were not dissolved, and that if either at any time pays more than its proportion, the other shall be liable therefor, a bill will lie in equity to enforce payment by the two bodies, respectively, in the proportion which the assessment rolls show that the property in one bears to the property in the other. A bondholder is not confined to *mandamus* or other legal remedies, if such exist. Morgan v. Beloit City and Town, 7 Wall., 613.

A mortgage on real estate to secure a debt executed by public act, according to the law of Louisiana, although it imports confession of judgment, may be enforced by suit in equity. The fact that there is a statutory remedy in Louisiana on such a mortgage does not oust the jurisdiction of a court of equity to enforce it. Where, under the jurisprudence and laws of a State, want of privity is not an obstacle to the enforcement by one person of a contract made for his benefit by another person with a third person, held: that the equity courts of the United States, sitting in such State, will enforce such contract at the suit of the beneficiary. Benjamin v. Cava-roc, 2 Woods's, 168.

The Legislature of Alabama passed an act creating a harbor board, with authority to contract for the improvement of Mobile harbor, and requiring the authorities of the county of Mobile to issue to said harbor board the bonds of the county, to an amount not exceeding one million of dollars, to pay for said improvement. The harbor board made a contract for work on the harbor, to be paid for in county bonds. The work was performed by the contractors, and on settlement there was found due to them six county bonds of one thousand dollars each. The act creating the harbor board was repealed, and the board could not demand or receive from the county authorities the bonds to pay this obligation. Held, that the bill in equity of the contractors, against the county, to compel the delivery directly to them of the bonds, was well brought, and that a court of equity had jurisdiction of the case. Kimball & Slaughter v. The County of Mobile, 3 Woods's, 555.

Under the statutes of Ohio, the widow and heirs of a deceased person, who are the recipients of property from the estate, are liable for its debts to the extent of such property, under the conditions and limitations of the statute. This liability enforced in equity. Goshorn v. Alexander, 2 Bond, 158,

no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.' And in *Clark v. Graham* (6 Wheat., 577), it is said: 'It is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situated.' In the case of *McCormick v. Sullivant* (10 Id., 192), the court held a will devising lands in Ohio, which was made and recorded in Pennsylvania, where the deviser resided, and which was otherwise perfect, inoperative to confer title in Ohio, because it had not been probated in that State, as the law of Ohio required. 'It is an acknowledged principle of law,' said the court, 'that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another.'

"In the case of *Watts et al. v. Waddell et al.* (6 Pet., 389), a question very much like the one before us arose. Watts was seeking to compel Waddell to accept a deed and pay for lands which he had sold him many years before, the relief sought being in the nature of a specific performance. It was objected that Watts could not convey a good title to a part of the land which he claimed to receive from the heirs of Powell by a decree rendered in the Circuit Court for the district of Kentucky. And although the proper parties were before that court, and a conveyance had been made to Watts by a commissioner appointed by the court, it was held that, as no statute of Ohio recognized such a mode of transferring title, the deed of the commissioner was wholly ineffectual. It will be seen that here was a court of equity proceeding according to its usual forms, transferring title from one party to another, both of whom were before the court, yet its decree held wholly ineffectual under the principle we are considering.

"We will close these citations by using the language which had the unanimous assent of the court in the recent case of *McGoon v. Scales* (9 Wall., 23): 'It is a principle too firmly established to admit of

dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances.'

"The decree in this case, the sale made under it, and the deed made on that sale, will constitute a transfer of the title within the meaning of the principle thus laid down. Neither the purchaser at that sale, nor any one holding under him, can show title in any other way than through the judicial proceeding in this suit. These proceedings are a necessary part of the transfer of title. The Legislature of Illinois has prescribed as an essential element of the transfer by the courts in foreclosure suits, that there shall remain to the mortgagor the right of redemption for twelve months, and to judgment creditors a similar right for fifteen months, after the sale, before the right of the purchaser to the title becomes vested. This right, as a condition on which the title passes, is as obligatory on the Federal courts as on the State courts, because in both cases it is made a rule of property by the legislature which had the power to prescribe such a rule. (See *United States v. Fox*, 94 U. S., 315.)

"But there is another view of the question which is equally forcible, and which leads to the same result. All contracts between private parties are made with reference to the law of the place where they are made and are to be performed. Their construction, validity and effect are governed by the place where they are made and are to be performed, if that be the same as it is in this case. It is, therefore, said that these laws enter into and become a part of the contract.

"There is no doubt that a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists.

"In the recent case of *Tennessee v. Sneed* (96 U. S., 69), we held that so long as there remained a sufficient remedy on the contract, an act of the legislature, changing the form of the remedy, did not impair the obligation of the contract. But this doctrine was said to be subject to the limitation that there remained a remedy which was

complete, and which secured all the substantial rights of the party. At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the CONSTITUTION of the United States. (*Edwards v. Kearzey*, 96 U. S., 595.)

“That this very right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, where the law giving the right exists when the contract is made, is very clearly stated by Mr. Chief Justice Taney, in the case of *Bronson v. Kinzie*, 1 How., 311. That case was one which turned on the identical statute of Illinois which is invoked by the appellant in this case. The mortgage, however, on which that suit was founded was made before the statute was passed; and the court held, that, because the statute conferred a new and additional right on one of the parties to the contract, which impaired its obligations, it was for that reason forbidden by the CONSTITUTION of the United States, and void as to that contract. But the Chief Justice, in delivering the opinion, further declared, that, as to all contracts made after its enactment, the statute entered into and became a part of the contract, and was therefore valid and binding in the Federal courts as well as those of the State. As it is impossible to state the case, and the doctrine applicable to the case before us, any better, we give the language of the court on that occasion :

“ ‘When this contract was made,’ said the court, ‘no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind, and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time, and, therefore, entered into the contract and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem

by paying the money after the day limited in the deed, and before he has foreclosed by the decree of the court of chancery; yet no one doubts his right or his remedy; for, by the laws of the State, then in force, this right and this remedy were a part of the law of the contract without any express agreement of the parties.' Speaking of the law now under consideration, he said: 'This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made.' 'Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt, and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions and they would be obligatory on the parties in the courts of the United States, as well as in those of the State.'

"In *Clark v. Reyburn* (8 Wall., 318), the court, in recognition of the doctrine that the statute becomes a part of the contract, uses this language: 'In this country, the proceeding in most of the States, and perhaps in all of them, is regulated by statute. The remedy thus provided, when the mortgage is executed, enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law 'impairing the obligation of the contract,' within the meaning of the provision of the Constitution upon the subject.'

"We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the Federal courts in suits in equity can not be controlled by the laws of the State, is expressed in terms so emphatic and so general as to seem to justify the inference

here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a State, or to add to or take from a contract that which is made a part of it by the law of the State, except where the law impairs the obligation of a contract previously made. And we are of opinion that Mr. Chief Justice Taney expressed truly the sentiment of the court as it was organized in the case of *Bronson v. Kinzie*, as it is organized now, and as the law of the case is, when he said that 'all future contracts would be subject to such provisions, and they would be obligatory upon the parties in the courts of the United States as well as those of the States.'

"It is not necessary, as has been repeatedly said in this court, that the form or mode of securing a right like this should follow precisely that prescribed by the statute. If the right is substantially preserved or secured, it may be done by such suitable methods as the flexibility of chancery proceedings will enable the court to adopt, and which are most in conformity with the practice of the court. (*Ex parte McNeill*, 13 Wall., 236.) In the case before us no better mode occurs to us than that prescribed by the statute; namely, that the master making the sale shall give the purchaser a certificate of the sale, with the sum at which the land was sold, and a statement that, unless redeemed within fifteen months by some one authorized by the law to make such redemption, he will be entitled to a deed. The matter being thus reported to the court, it can, at the end of the time limited, make such final decree of confirmation and foreclosure of all equities as are necessary and proper; or, if the land be redeemed, then such other decree as the rights of the parties consequent on such redemption may require.

"The decree of the circuit court will be reversed, so far as it requires the sale to be made in accordance with the course and practice of the court, and the case remanded, with directions to modify the decree, by making provision for the sale and redemption in conformity to this opinion; and it is so ordered."

§ 99. **Primary Rights—Legal or Equitable—Laws of United States.**—We have already had occasion to show that of the United States as a nation, or in their united capacity, there is, strictly speaking, no common law; no principle pervading the entire union from which rights emanate.<sup>409</sup>

When, therefore, the question arises whether right or title acquired under a law of Congress be legal or equitable, we look to the law itself to ascertain the essential features of such right or title, and treat it accordingly.

With respect to the public lands of the United States, the general rule is that a patent is necessary to pass the *legal title*, and that it is not competent for a State to declare by law that a title derived from the United States, which, by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States.<sup>410</sup> And it has been held where an agent purchased lands for another at a public sale of lands in a Territory he could be held to account as trustee for his employer, although the statutes of the Territory had abolished all resulting trusts, because the United States, being the owner of the public lands within the States and Territories, have the right to say to whom, in what mode, and by what title they shall be conveyed; and the jurisdiction of the courts of the United States, as courts of equity, is ample to enforce the performance of trusts under both the CONSTITUTION and laws.<sup>411</sup>

<sup>409</sup> See note 9, p. 42, and section 52, p. 193, *ante*.

<sup>410</sup> *Wilcox v. Jackson* 13 Pet., 498. See pp. 282 and 283, *ante*. But in some cases recovery may be had in ejectment on survey without a patent. *Bryan v. Forsyth*, 19 How., 334.

<sup>411</sup> *Irvine v. Marshall*, 20 How., 558. From the opinion of the court in this case we extract as follows:

"With regard to the fourth objection, of a want of jurisdiction in the courts of the United States, in the absence of express statutory provisions, to recognize and enforce a resulting trust like that presented by the present case, it is a sufficient response to say that the jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States. Those courts are created courts of common law and equity; and under whichever of these classes of jurisprudence such rights or duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong." (p. 546.)

§ 100. **Same—Laws of Former Governments.**—The necessity in some cases of having recourse to the laws of former governments, prevailing over territory ceded to, or acquired by, the United States, has been pointed out.<sup>412</sup> Speaking of an old French patent or grant, made in 1757, to a lot in the city of Mobile, Alabama, as if it were a perfect or complete title, the Supreme Court of the United States uses this language: "Such a title is not to be affected or regulated by the political authorities to whom a country is afterwards ceded, any more, or otherwise, than any private rights and property of the inhabitants of such a country."<sup>413</sup> And the same court, in *Steinbach v. Stewart*,<sup>414</sup> also an action of ejectment, where it was contended that a certain paper or deed was only a license to occupy, and not a grant of the land, say "Certainly, it is a very informal instrument, and were the rules of the common law to be applied to it, there would be difficulty in maintaining that it was a grant of the fee. It is to be noted, however, that its character and effect are to be determined by Mexican law. It was made before California had been ceded to the United States. In enquiring what was the intention and effect of the instrument, we are not then to be guided by the rules of the common law, or by the British statute of uses."<sup>415</sup>

§ 101. **Same—State Laws.**—Notwithstanding the thirty-fourth section of the judiciary act,<sup>416</sup> in declaring that the laws of the several States, except where the CONSTITUTION, treaties, or statutes of the United States otherwise require or provide, shall be regarded

<sup>412</sup> See section 55, p. 195, *ante*.

<sup>413</sup> *Doe v. Eslava*, 9 How., 421 (p. 445), citing *United States v. Arredondo*, 6 Pet., 691; *United States v. Perchman*, 7 Pet., 51-97; *Mitchell v. United States*, 1 Pet., 734-744; 12 Pet., 437, 438; 14 Pet., 349, 350.

<sup>414</sup> 11 Wall., 566.

<sup>415</sup> Instruments affecting land titles in Texas, executed while the Spanish-Mexican law prevailed there, are to be adjudged as to the title which they pass, whether complete or incomplete, by such law and not by the common law. *Hanrick v. Barton*, 16 Wall., 166; *Hunnicut v. Peyton*, 102 U. S., 333.

<sup>416</sup> See p. 25, *ante*; Revised Statutes, sec. 721. See also pp. 200, 202, 203, and notes, *ante*.



as rules of decision in the courts of the United States, limits the application thereof to "trials at common law," it is not to be inferred that State laws conferring primary rights, legal or equitable, may be disregarded in suits in equity. In an equity case involving the power of a married woman to dispose of her separate estate, it is said that the controversy should be decided according to the jurisprudence of the State, and that the court should administer the law of the case in all respects as if it were sitting within the State.<sup>417</sup> State laws

<sup>417</sup> *Slaughter v. Glenn*, 98 U. S., 242. See note 22, *ante*. Held by Mr. Justice Blatchford, in *Lorrillard v. Standard Oil Company*, 18 Blatch., 199, that a married woman, who was the sole owner of a patent, and who brought a suit in equity for its infringement, without her husband being a party, could under sections 629, 4919 and 4921, Revised Statutes U. S., and rule 90 of the Rules of Equity, in connection with the law of New York as to the status of the property of a married woman, maintain the suit, and that the husband need not be a party. It is said in the opinion:

"The defendant contends that the rule of practice of the courts of New York, regulated by the statutes of New York, which permits suits by a married woman in her own name, does not apply to suits in equity in this court; that there is no statute or rule which permits the plaintiff to bring this suit without joining her husband; and that under the general principles of equity practice, and the practice of the High Court of Chancery in England, the husband must be joined. Rule 90 of the Rules in Equity, prescribed by the Supreme Court, provides as follows: 'In all cases where the rules prescribed by this court and by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.'

"The legal title to this patent is in the plaintiff. By the law of New York, as interpreted by the courts of New York, a married woman may own property of every description in the same manner as if she were a *feme sole*. *Gage v. Dauchy*, 34 N. Y., 293; *Buckley v. Wells*, 33 Id., 518; *Knapp v. Smith*, 27 Id., 577. The bill alleges that the plaintiff belongs to New York and is a citizen of the United States, and that some of the infringements were committed in New York. Under the provisions of sections 629, 4919 and 4921 of the Revised Statutes of the United States, suits in equity for the infringement of letters patent must be brought by the party in interest in his or her own name, and such right cannot be delegated to another person to bring the suit in the name of such other person, when the suit is not for the benefit in any way of such other person. *Goldsmith v. American Paper Collar Co.*, 18 Blatch., 82. On the same principle, such other person is neither a proper nor a necessary party to be joined with the real party in interest, as plaintiff, when such other person has no interest in the patent, and when the suit is not for the legal benefit in any way of such other person. Under rule 90 it is inconsistent with the local cir-

touching the priority of judgment liens,<sup>418</sup> and State registration laws,<sup>419</sup> and the rights and titles of parties thereunder, are given effect in "suits in equity," as well as in "trials at common law." And in many other cases the courts of the United States, sitting in equity, regard as rules of decision State laws conferring substantial rights.<sup>420</sup> The true doctrine upon the subject is, that whenever a primary right, be it legal or equitable, is conferred by State law, if the Federal courts have jurisdiction of the subject matter and of the parties, they will enforce such right in the proper tribunal, whether it be of equity, admiralty, or common law.<sup>421</sup> Nor do they stop here, but where the right conferred is so interwoven with the

cumstances of this district to require the wife in this case to join her husband with her. The rule of joining husband with wife in suits to recover her personal property was founded upon the principle of unity of existence and interest between husband and wife, in law, and the right of the husband in the wife's personal property, and the care exercised by courts in regard to those who are not in a situation to take care of their own rights. These principles being now changed for this jurisdiction, the practice based on them necessarily falls. *Cessante ratione cessat lex*. Voorhees v. Boncateel, 16 Wall., 16-31."

<sup>418</sup>Stevenson v. Texas Railway Company, 105 U. S., 703. Under law of Iowa, holder of simple judgment lien has not equitable right to redeem from senior lienholder after execution of sheriff's deed made pursuant to the sale thereunder. Burham v. Fritz, 13 Fed. Rep., 368. This was a suit in equity, and the court followed the State law and the decision of the State court on the subject.

<sup>419</sup>Stevenson v. Texas Railway Company, 105 U. S., 703. Bondurant v. Watson, 103 U. S., 281. In this last case the court enforced, as a rule of property applicable to Louisiana, the decision of the Supreme Court of that State that a mortgage of lands has no effect as to third persons, unless it be inscribed in the proper public office, and that, save in the single case of a minor's mortgage upon the property of his tutor, every mortgage ceases to be effectual against third parties, unless it be reinscribed within ten years from the date of its original inscription, and that neither the pact *de non alienando* nor the pendency of a suit to foreclose, dispenses with the necessity of so inscribing or reinscribing it. The court cite in support of the view that it is a rule of property in the State of Louisiana and binding on the Federal courts, Suydam v. Williamson, 24 How., 427; Jackson v. Chew, 12 Wheat, 162; Beanregard v. City of New Orleans, 18 How., 497.

In *Ex Parte Christy*, 3 How., 292, the court (p. 316) recognize the validity and binding force of State liens, mortgages, etc., in bankruptcy proceedings.

<sup>420</sup>See note 408, *ante*.

<sup>421</sup>Smith v. Railroad Company, 99 U. S., 398; Van Norden v. Morton, 99 U. S., 378. See p. 36 and note 28, p. 202, *ante*.

form of remedy given by the State statute, that to reject the latter is to deny the former, they will make use of such former in "suits in equity," if 'substantially consistent with the ordinary mode of proceedings in chancery.'<sup>422</sup> Hence, in the statement so frequently made

<sup>422</sup> *Clark v. Smith*, 13 Pet., 195, presents this case. In an act of Kentucky, passed in 1796, to regulate proceedings in the courts of chancery of that State, it was provided that any person having both legal title to and possession of land, might institute a suit against any other person setting up claim thereto; and if the complainant should be able to establish his title to such land, the defendant should be decreed to release his claim thereto, and pay the complainant his costs, unless the defendant should by answer disclaim all title to such lands and offer to give such release to the complainant, in which case the complainant should pay the defendant his costs, except for special reasons appearing, the court should otherwise decree.

Clark filed his bill in the Circuit Court of the United States for the district of Kentucky to compel defendant to release his title, etc. The court was unanimously of opinion that Clark had established a legal title to the land, and that defendant had shown no right whatever; but the judges being divided in opinion on the question of the jurisdiction of the circuit court to compel the defendant to execute the conveyance prayed for in the bill, the bill was dismissed, and Clark prosecuted an appeal. From the opinion of the court, delivered by Mr. Justice Catron, we extract as follows:

"The Legislature having declared that he who has the legal and equitable title, and the possession, may treat the adverse claimant as a trustee, and coerce a release to himself of the inferior claim, of course the statute secures a highly valuable right, which it is the duty of the courts to enforce, and which can only be enforced in a court of equity.

"Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles, and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature, having its origin in the peculiar condition of the country. The unappropriated lands of that State have been opened to entry and grant at a very cheap rate, as this record shows, which policy has led to the abuse sought to be remedied by the bill. That clouds upon old titles by the issuance of new patents for the same lands would be the consequence, was manifest, and that citizens of other States are entitled to come into courts of the United States, to have the rights secured to them by the statute of 1796 enforced, we cannot doubt."

"The State Legislature certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the State courts; on the contrary, propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation. And such is the constant course of the Federal courts. For instance, in Tennessee the Legislature has provided that the courts of equity may divest a title

that the equitable jurisdiction of the courts of the United States can not be abridged by State laws, we are to have in view, as before observed, the distinction between *jurisdiction* and *right*; between the authority to hear and determine, and the origin of the right to be heard and determined.<sup>423</sup> As primary rights, interests and estates,

and vest it in another party to the suit, and that the decree shall operate as a legal conveyance. So in Kentucky, the Legislature has declared that the courts may appoint a commissioner to convey as the attorney in fact of a litigant party, and that such deed shall pass the title, in both instances binding infants and *femes covert*, if necessary. The Federal courts in the States referred to have adopted the same practice for many years, without a doubt having been entertained of its propriety. It may be said with truth that this is a mode of conveyance and of passing title, which the States have the exclusive right to regulate; still the same statute that conferred the power thus to decree a conveyance, prescribed the mode of proceeding; and had the form of the remedy been rejected by the courts of the United States, the right to have such record conveyance would have fallen with it, as they could not be separated.

"The undoubted truth is that when investigating and decreeing on titles in this country, we must deal with them, in practice, as we find them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case and the character of the equities involved in the controversy, so as to give effect to State legislation and State policy, not departing, however, from what legitimately belongs to the practice of a court of chancery."

The doctrine stated in above case is expressly recognized and affirmed in *Wickliff v. Owings*, 17 How., 47; *Fitch v. Creighton*, 24 How., 159; *Smith v. R. R. Company*, 99 U. S., 399. In *Parker v. Overman*, 18 How., 136, an appeal from the Circuit Court of the United States for the district of Arkansas, a suit was begun in the State court sitting in chancery. It was a proceeding under a statute of that State prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object was to quiet the title. The court, after referring to *Clark v. Smith*, *supra*, with approval, say: "In the case before us, the proceeding, though special in its form, is in its nature but the application of a well known chancery remedy. It acts upon the land, and may be conclusive as to the title of a citizen of another State. He is, therefore, entitled to have his suit tried in this court under the same conditions as in other suits or controversies." p. 141.

Referring to *Clark v. Smith*, *supra*, in *Central Pacific R. R. Company v. Dyer*, 1 Sawy., 641, where a statute of Nevada similar in effect was construed, Mr. Justice Field says: "To that extent it confers upon the possessor of real property a *new right*—one which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. That right the national courts will enforce in the same manner in which they will enforce other equitable rights of parties." (p. 649.) See also *Harmer v. Gwynne*, 5 McLean, 313; *Balmear v. Otis*, 4 Dill., 558; *Banerque v. Cohen*, McAllis., 113.

<sup>423</sup> See section 96, *ante*.

may be enlarged, restricted and regulated by State laws, the exercise of jurisdiction, that is to say, what it may effect or do, is necessarily influenced by State laws. The earliest utterance of the Supreme Court of the United States on the effect of State laws recognizing a title to be legal or equitable, will be found in *Sims v. Irvine*, decided in 1789.<sup>424</sup> It is spoken of by the same court as a leading case.<sup>425</sup> It

<sup>424</sup> 3 Dall., 425. The following is the opinion of the court:

"It appears that William Douglas, for services rendered, acquired, under the king's proclamation of 1763, a right to 5000 acres of unappropriated land in America; which right he assigned to Charles Sims, the lessor of the plaintiff below; and although by the terms of the proclamation the personal application of Douglas was requisite to obtain a land warrant on the said right, yet the laws of Virginia, passed subsequent to her independence, dispensed with such personal application, and made a warrant issuable to the assignee Sims. he being an inhabitant of that State on the third of May, 1779. A warrant he accordingly obtained, and the same duly located on Montour's island, the land in question; which his warrant was more than sufficient to cover, and which, from its description as an island, was perfectly aparted and distinguished from all other land. By which means Sims acquired to the said island a complete equitable title, and one which needed only a patent of confirmation to render it a complete legal title. A confirmation of this equitable title, as effectual as that of any patent could have been, was afterwards comprised in the compact between Virginia and Pennsylvania, and in the ratification of the same by the legislative act of the latter. The terms therein of 'reserve and confirmation' of the 'rights' which had been previously acquired, under Virginia, in the territory thereby relinquished to Pennsylvania, must, from the nature of the transaction, be expounded favorably for those rights, and so that title, before substantially good, should not, after a change of jurisdiction, be defeated or questioned for formal defects.

"It further appears that Sims, since the said compact and ratification, has, without any laches that would prejudice his claim, obtained a legal survey of the said land under Pennsylvania, in which State payment, or, as in this case, consideration, passed, and a survey, though unaccompanied by a patent, gives a legal right of entry, which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of chancery powers or for other reasons of policy or justice, is not now material. The right once having become an established legal right, and having incorporated itself as such with property and tenures, it remains a legal right notwithstanding any new distribution of judicial powers, and must be regarded by the common law courts of the United States in Pennsylvania as a rule of decision."

Mr. Justice Washington, in *Mayor v. Foulkrod*, 4 Wash., 349, discussing the difference in effect, as to rights and remedies, between the thirty-fourth section of the judiciary act of 1789 and the process acts of 1789 and 1792 and the non effect of State laws on equitable remedies in the courts of the United States, says: "It follows, therefore, that if a State law should declare that to be a legal title which upon general

<sup>425</sup> See *Strother v. Lucas*, 12 Pet., p. 452.

lays down the rule that where a right has become an established *legal right*, incorporating itself, as such, with property and tenures, it remains a legal right, and will be so regarded by the common law courts of the United States, notwithstanding the distribution of judicial powers between law and equity. In another case, while adhering to the rule that the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles, it is said: "Consistently with this construction it may be admitted that where, by the statutes of a State, a title, which would otherwise be deemed merely *equitable*, is recognized as a *legal* title which would be good at law, is under circumstances of an equitable nature declared by such statutes to be void, the rights of the parties, in such case, may be as fully considered in a suit at law, in the courts of the United States, as they would be in any State court."<sup>426</sup>

principles recognized by courts of equity would be considered as an equitable one, the courts of the United States would afford a legal remedy, suited to the case, to enforce it, without excluding at the same time the concurrent jurisdiction of the equity side of the court, if such a jurisdiction could be asserted as belonging to that side of the court. It was upon this ground that the Supreme Court sustained the legal remedy by ejectment in the case of *Sims v. Irvine*, the common law of this State being that a warrant, survey and purchase money paid constitutes a legal right of entry. Upon the same ground it is that this court entertains actions by assignees of choses of action which the laws of the State permit to be assigned."

<sup>426</sup> *Robinson v. Campbell*, 3 Wheat., 212. This case has been often cited in support of the rule that remedies in the courts of the United States, at common law and in equity, are to be not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. The action was ejectment; and it appears that the land in controversy was situated between two lines run in 1799 as the boundary lines between Virginia and North Carolina. After the separation of Tennessee from North Carolina, in an adjustment of the boundary between Virginia and Tennessee, the land fell within the State of Tennessee. Both parties claimed under grants from Virginia, the titles to lands derived from said State having been protected by the act of Tennessee, passed in 1803, for the settlement of the boundary line.

The plaintiff rested his title on a grant (founded on a treasury warrant) dated August 1, 1787, to one Jones, and a conveyance from Jones, dated April 14, 1788.

In *Russell v. Ely*,<sup>427</sup> an action of ejectment was brought in the District Court of the United States for the district of Wisconsin. One Barton conveyed the lot in controversy, by mortgage deed, to one Floyd P. Baker, to secure the payment of a note. Barton, on

The defendant, to support his right, offered in evidence a grant to one Joseph Martin, dated January 1, 1788, founded on a settlement right and intermediate conveyances to himself. Defendant also offered in evidence that a settlement was made on said land in 1788 by one Fitzgerald, who assigned his settlement right to said Martin; also, that a certificate in right of settlement was issued to said Martin by commissioners for adjusting titles to unpatented lands, on which certificate and one payment of composition money grant was issued.

This evidence was rejected by the court below. Defendant also offered in evidence a deed from plaintiff's lessor to one Arthur L. Campbell for the land in dispute, but the same was also rejected. Regarding the grant as the *legal title*, it will be seen from this statement that the grant under which the defendant claimed was made some five months after the grant under which the plaintiff claimed.

In *Strother v. Lucas*, 6 Pet., 763, it was objected, on the part of the defendant in the court below, that the plaintiff's claim was an equitable right, etc. Under the laws of Wisconsin, the plaintiff's claim was sufficient to support ejectment.

The court say: "How far the courts of the United States will adopt such practice has come under the consideration of this court in several cases (*Robinson v. Campbell*, 3 Wheat., 212; *De la Croix v. Chamberlain*, 12 Wheat., 599), and the court has been strongly inclined against sustaining the action upon a mere equitable title, except, perhaps, where by the statutes of a State a title which would otherwise be deemed merely equitable is recognized as a legal title, or a title which would be valid at law. We do not mean, however, to be understood as expressing any opinion upon this question in the present case. But, as the cause has been tried upon the merits, and so argued here, we think best to decide upon the merits, without noticing the objection to the forms of the action."

In *Ringo v. Binns*, 10 Pet., 269, the effect of an act of the Legislature of Kentucky in raising an entry and survey into a *legal title*, etc., is considered.

In *Black v. Zacharie*, 3 How., 483, it is held that the *legal title* to stock held in corporations situated in Louisiana does not pass under a general assignment of property until the transfer is completed in the mode pointed out by the laws of that State relating to corporations, but that the *equitable title* will pass, if the assignment be sufficient to transfer it, by the laws of the State in which the assignor resides; and if the laws of the State where the corporations exist do not prohibit the assignment of equitable interests in stock, such assignment will bind all parties who have notice of it. "It is true," say the court (p. 512), "that the same distinctions between legal and equitable rights may not, as to the mode of remedy, exist in that State (Louisiana) which are recognized in States governed by the common law, but the same purposes of substantial justice are attained there, under similar circumstances, as the courts in other States are accustomed to administer in a different form."

<sup>427</sup> 2 Black, 575.

the next day after the date of the deed, conveyed the land in fee to one Clifford A. Baker. The plaintiffs, on trial, exhibited a regular chain of title from Clifford A. Baker to themselves, and the defendant proved himself to be the owner and holder of the note and mortgage which had been made to Floyd P. Baker, and being in possession of the premises sued for, he claimed the right to hold them until his debt was paid. One of the questions arising in the case was, whether the legal title was, on the face of the deeds, in the plaintiff; and the court below so held; and this was assigned for error. In the Supreme Court, the plaintiff in error contended that by the mortgage deed the legal title passed to Floyd P. Baker; and that by the deed made the next day thereafter, by the mortgagor to Clifford A. Baker, nothing passed but the equity of redemption. Mr. Justice Miller, in delivering the opinion of the court, after stating that, in the view which the court took of the matter, the numerous authorities from English and American decisions cited by counsel were of little value, says: "These deeds were both made in Wisconsin, in reference to land lying in that State, and in their construction must be governed by its laws. The Revised Statutes of Wisconsin, chapter 141, section 28, enact, that 'no action of ejectment shall hereafter be brought by mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises, until the equity of redemption shall have expired.' Chapter 154, section 11, provides that 'in every case the mortgagor may retain full possession in trust for the mortgagee or purchaser, of all premises mortgaged by him, until the title shall absolutely vest in the purchaser of such mortgaged premises, according to the provisions of this chapter.' The Supreme Court of Wisconsin, in the case of *Wood and Moon v. Trask* (7 Wis. R., 512), speaking of these provisions, and perhaps others, in *pari materia*, says: 'Our statute has essentially changed the rule of the common law, in relation to the position of the fee of the mortgaged premises, after condition broken. The fee does not vest, upon default of the mortgagor, in the mortgagee or his assignee. The fee only vests upon sale and foreclosure.' In *Tallman v.*



Ely (6 Wis. R., 257), the same court says: 'Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption (section 53, chapter 106); or, in other words, he must complete his title before he shall be permitted to recover at law upon the strength of it.' These expositions of the statutes of Wisconsin are to be followed by the Federal courts as rules of construction, and from them it results that the legal title did not pass to Floyd P. Baker by the mortgage deed of July 23, but did pass to Clifford A. Baker, by the deed in fee made the day after."<sup>428</sup>

**§ 102. Right and Remedy Not Necessarily of the Same Character.**—The character of remedy, as legal or equitable, is not necessarily governed by the like character of right. In some instances, the right invaded may be a purely legal primary right, whilst the remedial right, or the remedy afforded for its invasion, may be known only to courts of equity. In others, the primary right in question may be equitable, whilst the remedial right, or remedy afforded for its violation, can only be enforced at law. It is a general rule, however, that where purely equitable primary rights, estates, titles and interests, created by equity and not by law, are to be declared, maintained and enforced, the remedy is to be in equity.<sup>429</sup>

<sup>428</sup> See also *Witherell v. Wiberg*, 4 Sawy., 232, where it is held in an action of ejectment, that in Oregon a mortgage is a mere security, and the mortgagor, both before and after condition broken, is the owner of the premises, subjects to the lien of the mortgage, and cannot be deprived of possession against his will, otherwise than by foreclosure and sale. See also as to effect of State laws upon title of mortgagor and mortgagee, *Hutchins v. King*, 1 Wall., 53.

<sup>429</sup> "Equity," says Prof. Pomeroy (1 Eq. Juris., section 97), "as a branch of the national jurisprudence, and so far as it differs from the law, consists in fact of two parts, two different kinds of rules and rights: First, it contains a mass of rules which create primary rights and duties, entirely irrespective of the remedies, which are different from the corresponding rules, rights, and duties, with respect to the same subject matter contained in and enforced by the law. Secondly, it contains another mass of rules defining and conferring a variety of special remedies and remedial rights, both of which are to a very great extent unknown to the law. These remedies and rights to them are peculiarly 'equitable,' in contradistinction to those of the law, and irrespective of any difference in the primary rights for the violation of which they are granted. There may be four kinds of cases arising in the administration of the equity jurisdiction. (1) The primary right of the com-

**§ 103. Distinction between Legal and Equitable Rights Generally.**—We distinguish between legal and equitable remedies, as we do between legal and equitable primary rights, by recourse to the common law, from which we derive our knowledge of legal and

plainly party which has been broken may be purely legal, that is, a right which the rules of law confer, while his remedial right and the remedy which he obtains may be entirely equitable, recognized, and given by equity alone. (2) His primary right which has been violated, may be one which the rules of equity alone create, while his remedial right and remedy may also be only known to equity. (3) His primary right broken may be entirely equitable, but his remedial right and remedy may be legal, such as are recognized, enforced, and granted by the law. (4) In some cases, few in number, his primary right may be legal, while his remedial right and remedy are also legal, such as are administered by courts of law. The peculiar feature which distinguishes equity from the law does not, therefore, consist solely in the fact that it possesses remedies which the law does not admit, nor solely in the fact that it creates and confers primary rights and duties different from any which the law contains; but in both these facts combined."

A suit by one who holds the legal title to land—his primary right of course being legal—to restrain the commission of waste upon it, or of trespass doing irreparable damage; also the suit by the owner in fee of land in possession, to declare his own title against the other claimants not in possession, whether their own claims be legal or equitable, are given as illustrations of the first class. This latter kind of remedy is given by statute in many States. It is very plain in these cases that the plaintiff's estate and right are wholly legal, and the remedies are clearly equitable.

An illustration of the second class, is a suit by the vendee in a parol contract for the sale of land part performed, to obtain a specific performance. The right and estate under the contract are recognized by equity alone, and the remedy is purely equitable. Also a suit brought by a mortgagor of land who has made default, to redeem. According to the original legal and equitable doctrines, the estate of such mortgagor is purely equitable. According to the doctrine prevailing generally in this country, the estate of the mortgagor is legal, and the case would fall within the first class. Suits by which a plaintiff's equitable title is turned into a legal estate by the remedy of reformation, cancellation, and the like, also belong to this second class.

In the third class are some suits for accounting, the plaintiff's claim or interest in the fund or other subject-matter being equitable, and the accounting and pecuniary recovery being a legal remedy. Also many suits in which the plaintiff's interest is equitable and he recovers damages; also suits by an equitable assignee of a fund in the hands of a third person, to recover the amount thereof, where the plaintiff's ownership is wholly equitable, but his relief is simply the recovery of a certain sum of money.

The suits in the fourth class are generally, if not always, actions for accounting, in which the rights and interests of the subject-matter are purely legal, and the action is brought in equity merely for convenience. The accounting and recovery of money are of course a legal remedy. The case of an ordinary suit to settle

equitable principles. Not that the courts of the United States are restricted to such suits or cases, and to such only, as were known to the old and settled procedure of the common law, but that they are guided by the essential distinctions, as they are recognized by the common law, between legal and equitable remedies.<sup>430</sup> Legal remedies are fixed and governed by technical rules, which prevent their adaptation to circumstances. Their scope and object are but two-fold<sup>431</sup>—the recovery of the possession of specific things, land or chattels, or the recovery of a sum of money. Equitable remedies are varied in their form and character, specific in their object, and flexible in their nature.<sup>432</sup>

As to when a remedy is to be adjudged legal or equitable, especially when founded upon State law, has been frequently considered. A recent and instructive decision may be here adverted to.<sup>433</sup> A judgment was recovered in the Circuit Court of the United

accounts among partners, where neither of them is insolvent, and no equitable liens or claims to marshal the assets arise, is a familiar example.

<sup>430</sup> See section, p. 3, ante.

<sup>431</sup> 1 Pom. Eq. Juris., section 109.

<sup>432</sup> The relation of law and equity courts, and the difference between the remedies administered therein, is admirably presented by Mr. Justice Story in 1 Story's Eq. Juris., sections 26, 27, and 28.

<sup>433</sup> *Ex parte Boyd*, 105 U. S., 647.

Following this case it is held, in *Senter & Co. v. Mitchell*, 16 Fed. Rep., 206, that the remedies given by the law of Arkansas to suitors in the courts of that State, supplementary to writs of attachment for discovery of the debtor's property, are applicable to suitors in the Federal courts, and may be enforced at law or in equity as the State law provides.

Under the act of June 1, 1872 (Revised Statutes, section 914), it is held that interrogatories, authorized by State statute, may be filed in the Federal court in an action at common law, in lieu of discovery. *Bryant v. Leyland*, 6 Fed. Rep., 125.

Under sections 914, 915, and 916 of the Revised Statutes, in common law actions, the district court has power to suspend the lien of a judgment upon lands of the judgment debtor during appeal or writ or error, and to cause the docket of the judgment to be so marked, in accordance with the provisions of the State practice. The lien of a judgment upon lands of a judgment debtor, depending upon the State statutes and practice as adopted under the United States laws, may be modified or suspended in accordance with the State practice, in the discretion of the court. *United States v. Sturgis*, 14 Fed. Rep., 810.

A writ of *scire facias*, issued by order of an administrator upon the death of a

States, for the Southern District of New York, in favor of the United States against Boyd and O'Rouk, on which execution was returned unsatisfied in part. By the laws of New York, when an execution against the property of a judgment debtor is returned

plaintiff, will not be questioned under the practice of the State of Maryland, although such administrator has been properly made a party to the cause, and could have at once issued execution on the judgment. *Brown v. Chesapeake & Ohio Canal Co.*, 4 Fed. Rep., 770.

The statute of a State provided, among other things, that when, upon the recovery of a judgment against a municipal corporation and the levy of an execution thereunder, sufficient property is not found to satisfy the same, a copy of such process shall be served on the collector and assessor, who shall then make an assessment and levy the required amount. *Held*, that a writ of mandamus, commanding the city council to provide for the payment of the judgment, will not be granted in the absence of proof that the requirements of the statute have been complied with. *Moran v. City of Elizabeth*, 9 Fed. Rep., 72.

Creditor's bill may be brought, though State law gives special proceedings for the same purpose. *Frazer & Chalmers v. C. B. & S. Co.*, 2 McCreary, 11, citing *Cropper v. Coburn*, 2 Curtis, 465, and *Bird v. Badger*, McAllis., 443.

Though a remedy at law may be provided by statute against an individual stockholder to enforce contribution, yet a Federal court of equity is not thereby deprived of its jurisdiction to entertain a bill filed against numerous stockholders for discovery, account and contribution against them all. *Holmes v. Shearwood*, 3 McCreary, 405. Nor can State laws enlarge the powers of the courts of the United States beyond the limits marked out by the Constitution. It is true that the courts of chancery of the United States, in administering the law of a State, may sometimes be called on to exercise powers which do not belong to the courts of equity in England; and, in such cases, if the power is judicial in its character and capable of being regulated by the established rules and principles of a court of equity, there can be no objection to its exercise. It falls within the just interpretation of the grant in the Constitution. But, beyond this, the State laws can confer no jurisdiction on the courts of equity of the United States. *Fontaine v. Ravenelle*, 17 How., 369.

Neither the practice of State courts over their own judgments and in administering equitable relief in a summary way, nor the statutes of the States, can determine the action of United States court on the subject. *Bronson v. Schulten*, 104 U. S., 410.

In this case, Mr. Justice Miller, delivering the opinion of the court, after adverting to a practice in the State courts to control their own judgments after the end of the term by administering summary relief, or relief of an equitable character, and explaining that it could be easily seen how this practice would be justified in States where a system had been adopted which amalgamated equitable and common law jurisdiction in one form of action, says: "The cases from the New York courts, which go farthest in that direction, are largely founded on the statute of that State, and we are of opinion that on this point neither the statute of that State, nor the decisions of its courts, are binding on the courts of the United States held there. The question relates to the power of the courts, and not to the mode of procedure. It is whether

unsatisfied, in whole or in part, the judgment creditor may obtain an order from the court, requiring the judgment debtor to appear and answer, concerning his property, before such judge, at a time and place to be specified in the order. On motion of the plaintiffs' attorney, the court ordered a reference to a commissioner of the court to examine Boyd and O'Rouk, the judgment debtors, as authorized by above statute. Said commissioner, by the order aforesaid, was authorized to appoint a referee, for the purpose of such examination, and the judgment debtors were ordered to appear before said referee on a day named, and answer before said referee concerning their property, etc. Boyd moved the court to vacate this order for illegality, which motion was denied. He refused to submit to an examination, and to take an oath to testify, under the order, and, on motion of the United States attorney, the court ordered him to be committed to the custody of the marshal, as punishment for contempt of the court in refusing to be sworn, etc. Boyd presented his petition to the Supreme Court of the United States for a writ of *habeas corpus*. In his petition he stated, in effect, that the proceedings supplementary to execution were not, by the laws of the State of New York, a remedy, in common law causes, to reach the property of a judgment debtor allowed in actions at law, in courts of the United States, by

there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts."

The fact that a State statute has provided a remedy at law against a fraudulent judgment does not preclude the judgment debtor from a resort to the equity courts of the United States for relief against it. *Noyes v. Willard*, 1 Woods's, 187.

In *United States v. Griswold*, 11 Fed. Rep., 807, where the defendant was arrested under a *capias ad satisfaciendum*, it is said: "The arrest in this case, as has been stated, was made under an act of Congress, but under section 914 of the Revised Statutes the subsequent proceedings thereon are governed by the law of the State. Indeed, the arrest itself might have been made under section 106 of the Oregon Civil Code, which authorizes an arrest in civil actions for a penalty or a fraud." In *Faull v. Alaska Gold and Silver Mining Co.*, 14 Fed. Rep., 657, notwithstanding the contention that the remedy was in equity, it was held that unpaid stock could be collected from a stockholder in a corporation by process of garnishment, as provided by the laws of Oregon.

section 916, Revised Statutes ; but that they were proceedings under the code of New York, to abolish common law causes and suits in equity. That the application of said code to the courts of the United States was not authorized by any act of Congress, and was in conflict with the provisions of article 3, section 2, of the CONSTITUTION of the United States, which preserves and establishes the distinction between relief at law and in equity. The court, after reviewing the decisions of New York, as to whether the proceeding supplementary to execution was a proceeding at law or in equity, and after reaching the conclusion that the proceeding could be maintained on the law side of the court, say :

“It thus appears that the proceeding in aid of execution, in its present form in New York, as well as that in which it was administered under the Revised Statutes by the court of chancery, was a statutory process, and did not form any part of that jurisdiction in equity which, as vested in the courts of the United States by the CONSTITUTION, is assumed to be inalienable. And the remaining question, therefore, becomes, not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as whether it can in any wise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the CONSTITUTION, or whether, by the adoption of that instrument, all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it.

“The conclusion will be not less clear, however, if we concede that the proceeding in question belongs historically, as to its form, to the administration of chancery courts. If we regard its nature, it will be perceived that it is, so far as it relates merely to the discovery of the debtor's assets, a collateral and auxiliary remedy. If the discovery results in ascertaining the existence of property, subject to levy under execution, then the remedy at law is perfectly restored. Or if, by lawful power over the person of the debtor, he may be compelled by a court of law to apply his property to the payment of his creditor's

claim, the satisfaction is complete. If, on the other hand, other parties with adverse claims are revealed, or obstacles to the pursuit of the legal rights of the judgment creditor are brought to light, or the interests to be subjected are not cognizable at law, or the equities require to be marshalled, it may be that relief can only then be had in a court of equity, where all parties can be made to appear, all conflicting claims adjudicated, and the complete remedy moulded to fit the circumstances of the case. But here we have nothing to do with any question but that of discovery. The only relief sought is knowledge of property belonging to the debtor, applicable, either at law or in equity, to the payment of the creditor's judgment. What shall be done after that knowledge has been acquired, is to be determined upon the circumstances as they may then appear, and can not now be considered. For the proceeding for discovery is distinct and entirely separable from the subsequent relief, if any shall then be sought. Now, it is of the essence of the jurisdiction of courts of equity, in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction, in the words of Story (Eq. Jur., section 1495), that 'courts of equity will not entertain a bill for discovery to assist a suit in another court, if the latter is, of itself, competent to grant the same relief; for, in such a case, the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending.' It follows, then, that although at one time courts of equity would entertain bills of discovery, in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged, by competent authority, to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least, become inoperative and obsolete. A bill in equity, to compel disclosures from a plaintiff or a defendant of matters of fact peculiarly within his knowledge, essential to the maintainance of the legal rights of either, in a pending suit at law, would scarcely be resorted to, unless under special circumstances,

now, when parties are competent witnesses, and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents, important as instruments of evidence, when the court of law, in which the suit is pending, is authorized by summary proceedings to enforce the same right. But, even conceding that such enlargements of the powers of courts of law do not deprive courts of equity of jurisdiction theretofore exercised, no one has ever supposed that they were illegitimate intrusions upon the exclusive domain of equity, or produced any confusion of boundaries between the two systems. No one has ever questioned the authority of Congress to make parties to a suit competent witnesses, or to confer upon courts of law power to compel the production of books and papers, because discovery was an ancient head of equitable jurisdiction. It is the very office of the principle of equity to supply defects in the law, and it is not to be regarded as anomalous that the technical law should, in the course of its necessary development, incorporate into its own organization improvements in procedure first introduced as equitable remedies. It is this very capacity of parallel growth that constitutes and perpetuates the harmonious co-existence of the two departments of our jurisprudence. Its history furnishes many examples and illustrations of this tendency and of its results.

“There is certainly nothing in the nature of an examination of a judgment debtor, upon the question as to his title to, and possession of, property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate as a proceeding at law, under the orders of the court where the record of the judgment remains, and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located, by legislative authority, to meet the requirements of



judicial convenience. Whatever logical or historical distinctions separate the jurisdictions of equity and law, and with whatever effect those distinctions may be supposed to be recognized in the CONSTITUTION, we are not of opinion that the proceeding in question partakes so exclusively of the nature of either that it may not be authorized, indifferently, as an instrument of justice in the hands of courts, of whatever description."

**§ 104. Ejectment—Legal Title—Equitable Defenses.—**

It is the established rule at common law that an equitable title will not support ejectment. In the application of this rule to the courts of the United States, it is said: "In actions of ejectment in the United States courts, *the strict legal title prevails*. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal courts. This record shows that plaintiff holds the only legal title which the courts of the United States can recognize. The oldest claim, the oldest possession, the oldest legal title, and the only patent from the United States, are with the plaintiffs, and in this action these must prevail. We are invited by plaintiffs in error into the discussion of the canon and civil laws of Mexico, concerning the titles to lands held by missions and other ecclesiastical bodies. We must decline to follow this lead. If there is any equitable reason why the only strict legal title, and the older Mexican claim and possession, should not prevail, it is not available in a court of law."<sup>434</sup>

And in another case, affirming the rule laid down in former decisions, the doctrine is broadly stated that an action of ejectment will not lie in the courts of the United States on a merely equitable title, notwithstanding a State legislature may have provided otherwise by statute.<sup>435</sup> Whether the title be legal or equitable, may, as

<sup>434</sup> Foster v. Mora, 98 U. S., 425 (p. 428).

<sup>435</sup> Hooper v. Scheimer, 23 How., 235, citing Fenn v. Holme, 21 How., 481; see also Shierburn v. DeCordova, 24 How., 423; Young v. Dunn, 10 Fed. Rep., 717; Gilmer v. Poindexter, 10 How., 257; Smith v. McCann, 24 How., 398; Clagett v. Kilbourne, 1 Black, 346; Bagnell v. Broderick, 13 Pet., 436; Brobst v. Brock, 10 Wall., 519.

we have seen,<sup>436</sup> depend upon State law; but if equitable, ejectment will not lie. The rule stated must not be carried to the extent of holding that, in all cases, the plaintiff must show a clear legal title, for actual possession of the land by the plaintiff, or his receipt of rent therefor prior to his eviction, is *prima facie* evidence of title on which he can recover against a mere trespasser,<sup>437</sup> and title by estoppel, it has been held, is sufficient to maintain the action.<sup>438</sup>

With respect to the defendant, we find it more frequently stated that equitable titles and defenses are not available in ejectment in the courts of the United States.<sup>439</sup> In a case where the court below instructed the jury, that "in the action of ejectment the legal title must prevail; that the plaintiff had a legal title by his patent; and the de-

<sup>436</sup> See p. 312, *ante*. Sale of land by a sheriff, under the laws of Maryland, seized under *fiery facias*, transfers legal estate to vendee by operation of law, and does not require sheriff's deed to give it validity. *Remington v. Linthicum*, 14 Pet. 84.

<sup>437</sup> *Burt v. Panjaud*, 99 U. S., 180.

<sup>438</sup> *Stoddard v. Chambers*, 2 How., 284.

<sup>439</sup> *Watkins v. Holman*, 16 Pet., 25; *Meyer v. Green*, 24 How., 268; *Agricultural Bank of Miss. v. Rice*, 4 How., 225; *Butler v. Young*, 1 Flipp., 276; *Hall v. Austin Deady*, 104; *Stark v. Starr*, 1 Sawy., 15; *Parsons v. Dennis*, 7 Fed. Rep., 317, S. C., 2 McCreary, 359; *Loving v. Downer*, McAllis., 360; *Mezes v. Greer*, McAllis., 401; *Hanrick v. Barton*, 16 Wall., 166.

In an action of ejectment, brought since the practice act of 1872, the petition was in the form required by the Ohio code. The answer, among other things, by way of cross petition, set up a purely equitable defense, and prayed for equitable relief. According to the practice in Ohio, this was a good answer, and the court could proceed under it and determine the rights of the parties, both legal and equitable. The plaintiff, by way of objection to this answer, insisted that said act of June, 1872, did not authorize an equitable defense of this character. *Sherman J.*, after considering the question, citing, among other cases, *Bennett v. Butterworth*, 11 How., 669, and *Fonn v. Holme*, 21 How., 486, says: "These decisions of the Supreme Court, the provisions in the acts of Congress, and the constitutional provision, I deem decisive of the question before me; even if the act of June 1, 1872, now under consideration, did not expressly except equity cases from its operation, it could not be recognized as valid. Because of the constitutional proviso, I hold that neither Congress nor the courts can do away the distinction between law and equity, nor the forms used, nor the causes and reasons which distinguish the one from the other. In the case before us, the plaintiff claims a cause of action at law. The defendant sets up a defense that is an equitable one, probably cognizable in a court of equity. He cannot set up such a defense in answer to an action at law. He must file his bill in chancery." *Butler v. Young*, *supra*.

defendant's, if any, was but an inchoate and equitable title, which might avail in a court of chancery, but it could not avail the defendant in an action of ejectment," the Supreme Court of the United States say : "The instruction was in exact accordance with numerous decisions of this court, and justified the verdict, even if there had been error in the other instructions given."<sup>440</sup> In another case,<sup>441</sup> it was held that a defendant in ejectment could not defend himself by setting up the record in a prior chancery suit between the same parties, by which the plaintiff in ejectment had been ordered to convey all his right and title to the defendant in ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made. "The decree," say the court, "is, therefore, if otherwise valid, nothing more than an *equitable right*, ascertained by the judgment and decree of a court of chancery ; and until executed by a conveyance of the legal title, according to the decree, Starke's heirs, and those claiming under them, have nothing but an equitable title to the land in controversy. To enable the defendants in this case to defend their possession successfully, upon their own title, *that title must be shown to be a good and subsisting legal title*, and superior in law to that set up by the plaintiffs ; otherwise, it opposes no legal bar to the recovery in the action of ejectment."

The rule announced in such general terms in the foregoing and other cases, is subject to important qualifications. Thus, in *Dickerson v. Colgrove*,<sup>442</sup> an estoppel *in pais*, or *equitable estoppel*, was allowed as a sufficient defense in an action of ejectment. One Chauncey, who owned the land in controversy, died, leaving two children, Edmund Chauncey and Sarah Kline, as his only heirs-at-law. Sarah and her husband conveyed, by mortgage deed, the entire premises to one Morton, who took possession and conveyed to defendants. Before

<sup>440</sup> *Singleton v. Touchard*, 1 Black, 342.

<sup>441</sup> *Hickey v. Stewart*, 3 How., 750.

<sup>442</sup> 100 U. S., 578 ; see, also, *Wirth v. Branson*, 98 U. S., 118, and *Branson v. Wirth*, 17 Wall., 32 ; *St. Louis Smelting and Refining Company v. Green*, 13 Fed. Rep., 208. Courts of equity will grant injunction to restrain ejectment at law in interest of party holding equitable title. *Apgar v. Christopher*, 10 Fed. Rep., 857.

Morton conveyed to defendants, learning that Edmund Chauncey lived in California, he caused a letter to be written to him, for the purpose of ascertaining whether he made any claim to the premises. Edmund Chauncey addressed a letter to his sister, Mrs. Kline, then in Michigan, wherein he disavowed, in strong terms, the intention to assert any such claim. The contents of this letter became known to Morton, who afterwards conveyed to defendants by warranty deeds, under which they entered into possession, and so continued up to the commencement of the suit, improving the property, etc. Some years after the letter was written, and after Morton sold to the defendants, Edmund Chauncey conveyed an undivided half interest in the premises, by quit claim deed, to Dickerson and Witherell; and Witherell subsequently conveyed his title to one Wheeler, who died during the pendency of the suit. The case, upon the foregoing facts, was submitted to the court without the intervention of a jury. The court held, as conclusions of law, that the action was barred by the statute of limitations and by an estoppel *in pais*, and gave judgment accordingly.

The Supreme Court, confining its opinion to the point of estoppel, notwithstanding the contention that the defendants' claim must be set up in equity, held it was available at law, and affirmed the judgment.

We refer to another case,<sup>443</sup> in which the one just mentioned was cited and approved. In 1859, M. & Co., judgment creditors of A., filed their bill in the Circuit Court of the District of Columbia, against him and others, setting forth that he had, without consideration, and with intent to defraud his creditors, conveyed to the other defendants his real estate in that District. It was adjudged, May 30, 1860, that certain lots of ground be sold by a trustee, to pay M. & Co., and such other creditors as might come in, according to the practice of the court. The trustee subsequently reported, that, having sold a part of the lots, and realized more than sufficient to pay M. & Co., he had discontinued the sale. His report was confirmed November 28, 1862. An order of the court, November 14, 1863, recites that certain other

<sup>443</sup> Kirk v. Hamilton, 102 U. S., 68.

creditors of A. had filed petitions in support of their claims, and directs that, he being a non-resident, notice of the character and object of the petition be given him by publication. Publication was made accordingly, and, the defendants failing to appear, the bill was taken as confessed. The case was referred to an auditor, who reported that the claims were in excess of the proceeds of the sale remaining in the hands of the trustee. His report was confirmed. Thereupon the trustee, without any order other than that entered May 30, 1860, proceeded to sell the remainder of the lots to B., for \$950. The sale was confirmed, and the cause referred to an auditor, to state the accounts of the trustee and report a distribution. A. appeared before the auditor and objected to the allowance of the simple contract debts. The report of the auditor was confirmed, and the lots were conveyed by the trustee by deed, bearing date December 14, 1865, to B., who entered thereon, and made improvements to the value of \$4,000. A., who then resided upon a lot adjoining the premises, asserted no claims to them, except as to three feet for an alley, and he afterwards admitted that even in that regard he was mistaken. A., December 21, 1872, claiming that the trustee's sale was void and passed no title, and having obtained a deed from the party to whom he had, in trust, previously conveyed the lots so purchased by B., brought ejectment against the latter. Upon this state of facts, the court, without affirming that the sale to B. was valid, in the absence of a special direction by the court to the trustee to sell after the first order had been executed, *held*, that as A.'s failure to object to its validity and apply to the court to set it aside, and his not asserting any title to the premises, although he had knowledge that B., claiming them under a judicial sale, confirmed by a court of general jurisdiction, was expending money and making improvements thereon, constituted an equitable estoppel, which precluded the maintenance of the action. In the opinion the court quote with approval the following, from Smith's Leading Cases:

"The question presented in these and other cases, which involve the operation of equitable estoppels on real estate, is both difficult and

important. It is undoubtedly true that the title to land can not be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the Statute of Frauds, which require a writing when the realty is involved. But it is equally well settled, that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case, not within its spirit, from the rigor of its letter, if it be possible to do so without violating the general policy of the act, and giving rise to the uncertainty which it was meant to obviate. It is well established, that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale, accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser, under circumstances where the omission operates as a fraud; and although the title does not pass, under these circumstances a conveyance will be decreed by a court of equity. It would, therefore, seem too late to contend that the title to real estate cannot be passed by matter *in pais*, without disregarding the Statute of Frauds; and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had in a merely legal tribunal, except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied, at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and, as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake, and there is nothing in the nature of real estate to exclude those wise and salutary principles which are now adopted without scruples in both jurisdictions in

the case of personalty. And whatever may be the wisdom of the change, through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions."<sup>444</sup>

The case of *Simmons v. Wagner*<sup>445</sup> presents another qualification of the rule that the defendant's title must be shown to be a good and subsisting legal title. It holds that a party in possession of lands, holding an uncanceled certificate of the register of the land office within whose district they are situate, showing that full payment has been made for them, may successfully defend in ejectment against a party who subsequently entered the lands and obtained a patent therefor. "After the certificate was issued," says the court, "the lands were no longer, in law, a part of the public domain, and the authority of the officers of the government to grant them, otherwise than to him or some person holding his rights, was gone. The question is not whether Wagner, if he was out of possession, could recover in ejectment upon the certificate, but whether Simmons could recover as against him. He is in a situation to avail himself of the weakness of the title of his adversary, and need not assert his own. We think it clear, therefore, that the court below was right in giving judgment for defendant on the facts found."

**§ 105. Test of Legal and Equitable Jurisdiction—Adequate Remedy at Law, Etc.**—Not only does the CONSTITUTION of the United States preserve the right of trial by jury *in suits at common law* where the value in controversy exceeds twenty dollars,<sup>446</sup> but, since the Judiciary Act of 1879, it has been the statutory rule "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law."<sup>447</sup> And "the absence of a plain and

<sup>444</sup> Vol. 2, Seventh Am. Ed., with notes by Hare and Wallace, pp. 733, 734.

<sup>445</sup> 101 U. S., 260.

<sup>446</sup> Seventh amendment, see section 2, p. 2, *ante*.

<sup>447</sup> Section 16, p. 18, *ante*. Now incorporated in the Revised Statutes, section 723,

adequate remedy at law," it is said, "affords the only test of equity jurisdiction."<sup>448</sup>

It is not by virtue of the legislative inhibition alone that the courts of the United States enforce this test. The doctrine has been repeatedly stated that "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, *because the defendant has a constitutional right to a trial by jury.*"<sup>449</sup> And in a recent case this language is used: "Indeed, it is the settled doctrine of this court that this distinction of jurisdiction between law and equity is constitutional to the extent to which the seventh amendment forbids any infringement of the right of trial by jury as fixed by the common

<sup>448</sup> *Watson v. Sutherland*, 5 Wall., 74.

<sup>449</sup> *Hipp v. Bahin*, 19 How., 271 (p. 278).

In the case of *Lewis v. Cocks*, 23 Wall., 466, Mr. Justice Swayne delivering the opinion, after referring to the distinction between law and equity, and to the sixteenth section of the Judiciary Act, says: "It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case *the adverse party has a constitutional right to a trial by jury.*" In this case it was sought to make a bill in equity take the place of an action of ejectment. See, also, *Insurance Company v. Bailey*, 13 Wall., 616; *Dumont v. Fry*, 12 Fed. Rep., 21; *Spring v. Domestic Sewing Machine Co.*, 13 Fed. Rep., 446.

After referring to the Seventh Amendment of the Constitution, and the sixteenth section of the Judiciary Act, Mr. Justice Baldwin, in *Baker v. Biddle* (1 Bald., 394), remarks: "Taking the amendment, the law, and their construction as the one law, it follows, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a final judgment, which affords a remedy, plain, adequate and complete, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right of trial by jury. If the right is only an equitable one, or, if legal, the remedy is only equitable, or both legal and equitable, partaking of the character of both, and a court of law is unable to afford a remedy according to its old and settled proceedings, commensurate with the right, the suit for its assertion may be in equity. This distinction is strongly illustrated in a case on the occupying claimant law of Ohio, directing compensation to be made for improvements on land recovered by ejectment, to be ascertained by commissioners appointed by the court which tried the cause. The Supreme Court held the law valid so far as respected the right of compensation, but unconstitutional as respected the mode of ascertainment, inasmuch as the circuit courts of the United States, in a suit at law, must submit every question of fact to a jury." *Bank of Hamilton v. Dudley*, 2 Pet., 492, 525.



law.<sup>450</sup> The constitutional rule, however, is not to be understood as preventing the determination by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession.<sup>451</sup> The objection that there is an adequate remedy at law raises a jurisdictional question, and will be enforced by the court *sua sponte*, although not raised by the pleading nor suggested by counsel.<sup>452</sup> Even where it is not apparent upon the face of the bill, but the bill is framed *so as to avoid the point*, if, in looking at the proofs, it appears that the case is one for which there is a plain and adequate remedy at law, it is the duty of the court to decline jurisdiction and dismiss the bill.<sup>453</sup> And, while there are some precedents<sup>454</sup> that the objection should be interposed in the first instance, otherwise it will not be noticed, the weight of authority is decidedly the other way.<sup>455</sup> Even where a cause of action cognizable at common law is entertained in equity, on the ground of some equitable relief sought by the bill, which turns out cannot, for defective proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.<sup>456</sup> But if some of the matters charged in the bill are peculiarly of equitable cognizance, the defense that there is an adequate remedy at law will, in all cases, be allowed to prevail.<sup>457</sup> In a very recent case, it is said: "In view of the early enactment by Congress, in the sixteenth section of the Judiciary Act (Revised Statutes, section 723), declaring 'that suits in equity shall not be sus-

<sup>450</sup> Root v. Railway Company, 105 U. S., 189 (p. 206.)

<sup>451</sup> Barton v. Barbour, 104 U. S., 126.

<sup>452</sup> Olerichs v. Spain, 15 Wall., 211.

<sup>453</sup> Lewis v. Cocks, 23 Wall., 466.

<sup>454</sup> Wylie v. Coxe, 15 How., 415; Thompson v. R. R. Co., 6 Wall., 134.

<sup>455</sup> Dumont v. Fry, 12 Fed. Rep., 21, and authorities therein cited.

<sup>456</sup> Dowell v. Mitchell, 105 U. S., 430, citing Russell v. Clarke, 7 Cranch, 69; Price's Patent Candle Co. v. Bauwen's Patent Candle Company, 4 Kay & J., 727; Bailey v. Taylor, 1 Russ. & M., 73; French v. Howard, 3 Bibb (Ky.), 301; Robinson v. Gilbreth, 4 id., 183; Nourse v. Gregory, 3 Litt. (Ky.), 378.

<sup>457</sup> Duff v. First National Bank, 13 Fed. Rep., 65.

tained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law,' the rule laid down in *Hayward v. Andrews*<sup>458</sup> is entitled to special consideration from the courts of the United States. This enactment certainly means something, and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."<sup>459</sup>

The importance of the rule under consideration makes it proper to state some of the more general principles governing its application. And, *first*, we naturally inquire, to what law does the Judiciary Act refer? Is it the law of the several States, or the common law, which must afford plain, adequate and complete remedy in order to oust equity of its jurisdiction? It has been stated to be the latter,<sup>460</sup> and this is generally true in the sense that State statutes, conferring upon State courts jurisdiction to enforce equitable rights by statutory proceedings, do not take away from the Federal courts their equitable jurisdiction.<sup>461</sup> But it does not follow that State laws are without influence in equity cases. Thus, it has been held that, while a court of equity is the proper tribunal to ascertain the proportion of indebtedness chargeable to a stockholder of a bank on his personal liability, still, if, by the law of the State, as declared by its highest tribunal, an action of debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholders are known and can be stated, the extent of his liability in such cases being fixed, and the amount with which he should be charged being a mere matter of computation, a similar action at law will be sustained in such cases in the circuit court of the United States.<sup>462</sup>

<sup>458</sup> 106 U. S., 672.

<sup>459</sup> *New York Guaranty and Indemnity Co. v. Memphis Water Co.*, Sup. Ct. U. S., March 12, 1883; 2 Sup. Ct. Rep., 279.

<sup>460</sup> *Cropper et al. v. Coburn*, 2 Curtis, 465, citing (p. 472) *Robinson v. Campbell*, 3 Wheat., 212; *Bodley v. Taylor*, 5 Cranch, 191; *United States v. Howland*, 4 Wheat., 108; *Boyle v. Zacharie*, 6 Pet., 648.

<sup>461</sup> *Benjamin v. Cavaroc*, 2 Woods's, 168; *United States v. Howland*, 4 Wheat., 108.

<sup>462</sup> *Mills v. Scott*, 99 U. S., 25.

In the second place the enquiry presents itself : What is meant by a *plain, adequate and complete* remedy? The numerous decisions upon this point, some of which we have collected in the note below,<sup>463</sup> attest the difficulties experienced in the application of the rule. The

<sup>463</sup> In *New York Guaranty and Indemnity Company v. Memphis Water Company*, Sup. Ct. U. S., March 12, 1883, 2 Sup. Ct. Rep., 279, it is said: "We have lately decided, after full consideration of the authorities, in the case of *Hayward v. Andrews*, 106 U. S., 672. that an assignee of a chose in action on which a complete and adequate remedy exists at law, cannot, merely because, as such assignee, his interest is an equitable one, bring a suit in equity for the recovery of the demand. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of the trustee, and held for the benefit of '*cestuis que trust*.'"

"Besides the authorities cited in *Hayward v. Andrews*, reference may be made to *Miltf. Pl.*, 123, 225; *Willis Eq. Pl.*, 435, note g; *Adair v. Winchester*, 7 Gill. & J., 114; *Moseley v. Boush*, 4 Rand., 392; *Doggett v. Hart*, 5 Fla., 215; *Smiley v. Bell, Martin & Y.*, 378; and *English and American notes to Ryall v. Bowles*, 2 White & T. Lead. Cas. Eq., 1567, 1670 (Ed. 1877.)"

The assignee of a chose in action cannot proceed in equity to enforce, for his own use, the legal right of his assignors, merely upon the ground that he cannot maintain an action at law in his own name. *So held*, where the owners of letters-patent assigned them, together with all claims for damages by reason of the previous infringement of them, and the assignee filed his bill to recover such damages. *Root v. Railroad Co.*, 105 U. S., 189, cited and approved. *Hayward v. Andrews*, 106 U. S., 672.

A., an alleged creditor of B., whose claim had not been established at law, filed his bill against the latter, averring him to be insolvent, and against C., a debtor of B., praying that the debt due from C. be applied to the payment of the claim. There being no assignment to A. by B. of his debt against C., and no lien upon the funds in the hands of the latter,—*Held*, that the bill could not be sustained. *Smith v. R. R. Co.*, 99 U. S., 398.

The loss of a draft is not sufficiently proved, to support a suit in equity thereon against the drawer or acceptor, by evidence that it was left with a referee appointed by order of court to examine and report claims against an estate in the hands of a receiver, and that unsuccessful inquiries for it have been made of the referee, the receiver, and the attorney for the present defendant in those proceedings, without evidence of any search in the files of the court to which the report of the referee was returned, or any application to that court to obtain the draft. *Rogers v. Durant*, 106 U. S., 644.

Where the marshal had levied an execution on a crop of sugar and molasses, the intervention and third opposition of parties claiming a superior lien and privilege on the property, asking that the marshal be required to retain sufficient of the proceeds to pay the claim of the intervenors and for judgment against the judgment debtor for the amount of said claim, is a proceeding upon the law side of the court, and the

remedy at law must be as practical and efficacious to the ends of justice and its prompt administration as the remedy in equity, in order to oust the equitable jurisdiction;<sup>464</sup> and where the remedy is more adequate, equity will exercise jurisdiction.<sup>465</sup> Thus, where

interveners are not compelled to resort to a bill in equity for relief. *Bank v. Labitut*, 1 Woods's, 11.

Where a contract and lease relating to the operation of a railroad had been performed for a time and then the parties failed to meet their engagements, on a bill filed to enforce the contract and asking for various restraining orders against some of the defendants, the application being made because of the contract and the various relations which existed between the parties: *Held*, that these facts constitute a case where there may not be a full remedy at law, and which is properly brought in a court of equity. *St. Louis, A. & T. H. R. R. Co. v. Indianapolis & St. L. R. R. Co.*, 9 Bissell, 144.

Where a bill charged that the complainants are the legal owners of lands of which the defendants have forcibly taken possession under a false and fictitious claim of title, but giving no intimation of the nature of the fictitious title, the bill is bad for want of equity on its face. The remedy in such a case is an action at law. *Speigle v. Meredith*, 4 Bissell, 120.

A municipal corporation, obligors in a bond, cannot ask relief in equity, that the obligee be enjoined from proceedings at law, and that the bond be surrendered, when its bill alleges that the bond was issued without authority, in violation of law and in fraud of the town; that the obligee knew this when he took it; the obligee's possession is merely colorable, and that he gave no value for it, and never had any right or title to the bond. Such allegations show a complete defense to the bond at law, and a judgment against the obligee at law would give as full protection every way to obligor as a decree in equity. *Grand Chute v. Winegar*, 15 Wall., 373.

When, in a single adventure, which is closed, a person, jointly interested therein with others, appropriates the proceeds to his own use, he becomes a debtor to his associates, and an action at law gives adequate relief. *Wann v. Kelly*, 5 Fed. Rep., 584.

Where question of fraud has been determined in action at law, it cannot afterwards be in equity. *Blanchard v. Brown*, 3 Wall., 245.

Under the statute of Oregon, which provides that a person in possession of real property may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest, a bill will not lie on a possession without some right, legal or equitable, first shown.

Complainants, as heirs of Clarissa Howd, deceased, filed an amended bill, alleging that said Clarissa Howd and her deceased husband, before their marriage, agreed that each "should have nothing to do with the others property; that his should go to his children, and her's to her heirs and relatives;" that upon the death of said Clarissa, her husband had asserted his exclusive ownership to all of her property,

<sup>464</sup> *Barber v. Barber*, 21 How., 582.

<sup>465</sup> *Wylie v. Coxo*, 15 How., 415.

parties are threatened with numerous suits, the remedy at law is not adequate.<sup>466</sup> And where the rights of party can only be enforced at law by long continued, strenuous and expensive litigation, and those rights can be more promptly and efficiently asserted in equity,

and devised the same to his two children, against whom and the executor this bill is filed. *Held*, upon a consideration of the facts, that there was nothing in this case to give an equity court jurisdiction; that the only effect of such an agreement would be to estop the devisees and executor of the deceased husband from asserting title to the property; that the parties must proceed at law, and, the real estate having been converted into personal, the administrator of said Clarissa was the proper party to sue at law, and that the legal representatives of said Clarissa could only acquire title through administration of her estate. *Strong v. Wiggins*, 13 Fed. Rep., 418.

A statute of the State of Massachusetts provides that if a corporation be dissolved leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if execution issue, and judgment be satisfied by the parties sued, then those parties may sue all who were stockholders at the time of such dissolution for the recovery of the portion of such debt for which they were liable. It further provides that no stockholder shall be liable to pay the debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him. *Held*, that a corporation is not dissolved, within the meaning of such statute, by bankruptcy and a failure to hold meetings, elect officers, or do business. *Held, further*, that the liability imposed by this statute must be enforced by action at law and not by suit in equity. *Morley v. Thayer*, 3 Fed. Rep., 737.

In 1859 A. lent to B., who was largely interested in an embarrassed railroad, \$5000 to buy certain judgments against the road, and B., having bought, in 1859 and the early part of 1860, judgments to the amount of \$31,000, assigned the whole of them to A., absolutely. Subsequently, that is to say in August, 1860, A. made a transfer (so-called) of them to B. "upon B.'s payment of \$5000, with interest from this date," and gave to B. a power of attorney, of the same date, authorizing him "for me and in my name" to dispose of them as he might see proper. *Held*, that the so-called transfer was executory, amounting only to an offer that if B. would pay the \$5000, B. should become owner of the judgments; and that B. having, in May, 1861, gone south and joined the rebels there, and not come back till 1865, could not, in 1868, file a bill, and on an allegation that A. had collected the judgments, claim the proceeds, less the \$5000 and interest, and that a bill making such an allegation and

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<sup>466</sup> *Noonan v. Lee*, 2 Black, 499.

A bill in equity is not demurrable on the ground of a plain, adequate and complete remedy at law, where it appears that the remedy at law can only be prosecuted by means of a large number of actions, involving many questions of values and accounts which it would be practically impossible for a jury to settle. *Plummer v. The Connecticut Life Insurance Company*, 1 Holmes, 267.

a stringent reason is offered for the application of its power.<sup>467</sup> But the mere fact that the evidence is voluminous, or tedious, is not a sufficient ground for invoking the aid of a court of equity.<sup>468</sup> And where it is doubtful whether an action at law can be main-

such a claim was demurrable, the bill not being one of discovery, and the complainant having complete remedy at law. *French v. Hay*, 22 Wall., 231.

The occupying claimant law of Ohio, which declares that the occupying claimant shall not be turned out of possession until he shall be paid for lasting improvements made by him, and directs the court, in a suit at law, to appoint commissioners to value the same, is repugnant to the Seventh Amendment to the Constitution of the United States, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The compensation for improvements is a suit at common law, and must be submitted to a jury. *Bank of Hamilton v. Dudley*, 2 Pet., 492.

Further held in this case, that the ability of courts of the United States to proceed in suits at common law in the mode prescribed by the occupant law of Ohio, does not deprive the occupant of the benefit intended him. That the modes of proceeding which belong to courts of chancery are adopted to the execution of the law, and to the equity side of the court he may apply for relief. That sitting in chancery, it may appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin execution of judgment of court at law until this decree shall be complied with. This was an action of ejectment.

A bill in equity by the owner of real estate, sold at public judicial sale, will lie against a person who, at such sale, has made untrue representations which prevent other persons from bidding, and by which he has so, himself, got the property at an undervalue. The original owner is not confined to seeking relief through the summary modes, such as motion to set aside the sale, which it was within the power of the court from which the execution issued to grant. *Cocks v. Izard*, 7 Wall., 559.

The fact that a creditor has a remedy at law against a principal debtor, does not prevent him, after the issue in vain of execution against such principal, from proceeding in equity against a guarantor. *Railroad Company v. Howard*, 7 Wall., 392.

The "claim law" of Georgia, so far as the same applies to real estate, provides for equitable relief. It is, therefore, a remedy which cannot be administered in the Federal courts, and is not prescribed to be used therein by the act of Congress, approved June 1, 1872, entitled "An act to further the administration of justice." (17 Stat., 197.) In Georgia, when the United States marshal levies an execution against A. upon the real estate of B., and threatens to sell the same, B. must file

bill in equity to stop the sale, and cannot resort to the "claim law" for relief. *Hall v. Yahoola River Mining Co.*, 1 Woods's, 544.

The purchaser of one partner's share or interest in the lands of an association cannot maintain ejectment for it; his remedy is in equity, where he may call for an

<sup>467</sup> *Crane v. McCoy*, 1 Bond, 422.

<sup>468</sup> *Bowen v. Chase*, 94 U. S., 812.

tained, equity will afford relief;<sup>469</sup> and, where a party has been deprived of his rights by fraud, accident or mistake, and has no remedy at law, a court of equity will grant relief.<sup>470</sup> If no benefit or advantage whatever appears to be gained by proceedings in equity,

account, and thus entitle himself to all that a judgment debtor could have claimed after payment of the partnership liabilities. *Clagett v. Kilbourne*, 1 Black, 346.

A complaint which is in form and substance a creditor's bill, is a case of equitable jurisdiction, and one requiring equitable relief as distinguished from legal. *Dunphy v. Kleinsmith*, 11 Wall., 610.

Owing to the community of interest, no action lies at law by one executor or administrator against his co-representative, but the remedy is in equity. So, where complainants as executors ask to recover a deficiency arising upon the sale of mortgaged premises, sold for satisfaction of a mortgage made by defendant, a co-executor and one of the obligees in the bond and mortgagee in the mortgage executed by himself, they are properly in a court of equity, and, having in their hands the funds out of which defendant's commissions are payable for his services as executor, they can retain the sum due as his share and apply it to reduce his indebtedness to the estate. *Ransom v. Greer*, 12 Fed. Rep., 607.

The stockholders of the Boone Manufacturing and Mining Company entered into the following agreement: "We \* \* hereby mutually agree with each other that we will each be responsible, in mutual degree, for all paper negotiated by the agent of the company for the use and benefit of the company, and should any paper negotiated by the agent, with the individual endorsement of one member, be unprotected by the official agent by reason of want of funds, then, in such case, the parties to this agreement be each and severally bound for the payment of such paper in mutual proportions; and this agreement shall continue in force until the payment of all such claims have been made."

In an action upon this contract by the holder of the paper of such company, endorsed by one of the parties to said agreement (both the corporation and the endorser being insolvent), *held*, that this agreement was a contract between the shareholders, and that a holder of the paper of the company could not maintain an action at law against the parties thereto. His remedy was by a suit in equity to be substituted to the rights of the endorser. *Farmers' National Bank v. Hannan*, 4 Fed. Rep., 612.

Where the title of the complainant, whether legal or equitable, is not doubtful or suspicious, equity will take jurisdiction and decree, whether the complainant be in actual possession or not; but in the case of an alleged legal title, if either of these objections appear, it is usual to send the complainant to a court of law to try his title, and retain the suit to await the result; and, in case of an equitable title, a court of equity first ascertains the title, and, if found for complainant, then makes partition. *Lamb v. Starr, Deady*, 350.

A suit brought under the statutes of Minnesota (Gen. St. 1878, c. 75, §2), by a

<sup>469</sup> *Bieknell & Jenkins v. Todd*, 5 McLean, 236.

<sup>470</sup> *Metcalf v. Williams*, 104 U. S., 93.

rather than at law, the bill will be dismissed without prejudice, in order that the rights of the parties may be adjusted at law.<sup>471</sup> Where the facts disclosed by a bill in equity would avail as a defense to an action at law which is sought to be restrained, and complainant is

party in possession of real property, to settle an adverse claim, belongs to the equity docket. *Leggett v. Cole*, 3 Fed. Rep., 332.

Where no remedy exists to recover back illegal *State* taxes when paid into the treasury, equity will restrain their collection, the plaintiff being otherwise without adequate remedy at law; and equity, having jurisdiction in such a case, will determine the validity of county as well as *State* taxes, embraced in the same collection, warrant and levy. *First National Bank of Omaha v. County of Douglas*, 3 Dillon, 298.

Holdera of junior patent cannot, in action at law, assail the senior patent. Relief is to be had in equity. *Hayner v. Stanly*, 13 Fed. Rep., 217.

The Illinois statute of 1877, concerning assignments for the benefit of creditors which provides that the county court shall have jurisdiction over assignees and the execution of the statute, does not deprive courts of equity of jurisdiction of a creditor's bill to set aside a fraudulent assignment, or preference consummated prior to the making of the assignment. *Strong v. Goldman*, 8 Bissell, 552.

The circuit court, notwithstanding the restrictive clause in the Judiciary Act of 1789, chapter 20, section 11, has jurisdiction in a suit in equity brought by a judgment creditor against his debtor and others (they being citizens of different States), to set aside conveyances made in fraud of creditors, although the ground of the judgment was a negotiable chose in action, on which, before judgment, a suit could not have been maintained in such court. A bill in equity lies to set aside such fraudulent conveyances, for there is not, in the proper sense of the terms "a plain, adequate, and complete remedy" at law, within the meaning of the sixteenth section of the Judiciary Act of 1879, chapter 20, which is merely affirmative of the general doctrines of the courts of equity. *Bcan v. Smith*, 2 Mason, 252.

The remedy of the *cestui que trust* against the trustee for negligence must be in equity, not at law. *Hukill v. Page*, 6 Bissell, 183.

A bill which charges that the defendant, through fraudulent practices, had secured the transfer to his own name of shares of stock in an incorporated company, to which the complainant held the equitable title, and prayed that the complainant might be declared the owner of the stock, presents a good case for the intervention of a court of equity. In such a case there is no adequate relief at law. *Kilgour v. the New Orleans Gas Light Co.*, 2 Woods's, 144.

When the ancestor, holding capital stock in a corporation, died, and, subsequent to the close of the administration of the estate, an assessment was made upon the stock: *Held*, that a suit in equity could be maintained against the heirs for such assessment to the extent of assets received from the ancestor. *Payson v. Hadduck*, 8 Bissell, 293.

The statute of Connecticut (Revision of 1875, p. 362, section 16), providing that

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<sup>471</sup> *Pierpont v. Fowle*, 2 Wood & M., 23.



not entitled to a discovery, the bill is demurrable.<sup>472</sup> But if the remedy at law, in defending an action, is a partial one, and would leave the defendant to renew the contest in a series of suits, he may have relief in equity.<sup>473</sup> If, however, a party neglects to make as full defense as he might have done in an action at law, it is no ground for the exercise of equitable jurisdiction.<sup>474</sup>

**§ 106. Power of Congress to Legislate as to Remedies—Effect of State Laws Generally.**—Mr. Chief Justice Marshall, in delivering the opinion of the court in the leading case of *Wayman v. Southard*,<sup>475</sup> referring to the authority of State laws to control the

final judgment shall not be rendered against a defendant in an action of ejectment, who has, in good faith, believing that he had an absolute title to the land, made improvements thereon, before the commencement of the action, until the court shall have ascertained the present value thereof, and the amount reasonably due to the plaintiff from the defendant for the use and occupation of the premises; that if the value of the improvements exceeds the amount due for use and occupation, final judgment shall not be rendered until the plaintiff shall have paid the balance to the defendant, but if the plaintiff shall elect to have the title confirmed in the defendant, and shall give notice of such election, the court shall ascertain what sum the defendant ought, in equity, to pay to the plaintiff, and, on its payment, may confirm the title in the land to the defendant, is a valid statute, and one that this court, sitting in equity, will administer at the suit of the defendant in the action of ejectment. *Griswold v. Bragg*, 18 Blatch., 202.

A. and B. having arranged the terms on which the partnership between them should be dissolved, stipulated that their clerk should examine their books, ascertain the amount which each had put into the firm and each had drawn out, and report the same as the basis of their agreed settlement, and that if any error was made, it should be corrected when discovered. The clerk made the examination and reported the sum of \$47,039.54 was due from B. to A. Thereupon, supposing the report to be correct, each made, executed, and delivered to the other all the papers necessary to perfect and complete the terms and conditions of the dissolution of the partnership. On the same day the clerk discovered that he had made an error of \$4,046.12 against A. B. having refused to correct it, A. filed his bill praying for an account, the correction, amendment, and cancellation of the papers so executed by them, and for a decree for the payment of the \$4,046.12 due him. The bill was dismissed on the ground that A.'s remedy was at law. *Held*, that the decree was erroneous. *Ivinson v. Hutton*, 98 U. S., 79.

<sup>472</sup> *Drexel v. Berney*, 14 Fed. Rep., 268; *Drexel v. Berney*, 16 Fed. Rep., 522. See *Grand Chute v. Winegar*, 15 Wall., 373.

<sup>473</sup> *Boyce v. Grundy*, 3 Pet., 210.

<sup>474</sup> *Hendrickson v. Hinkley*, 5 McLean, 211.

<sup>475</sup> 10 Wheat., 1.

proceedings and process in the Federal courts, says : "That it has not an independent existence in the State Legislatures, is, we think, one of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will probably never be advanced. Its utter inadmissibility will at once present itself to the mind if we imagine an act of a State Legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers in executing their judgments. No gentlemen, we believe, will be so extravagant as to maintain the efficiency of such an act. It seems not much less extravagant to maintain that the practice of the Federal courts, and the conduct of their officers can be indirectly regulated by the State Legislatures by an act professing to regulate the proceedings in the State courts and the conduct of the officers who execute the process of those suits." And, in another case, Mr. Justice Story observes : "State laws cannot control the exercise of the powers of the National government, or in any manner limit or affect the operation of the process or proceedings in the National courts. The whole efficiency of such laws in the courts of the United States depends upon the enactments of Congress. So far as they are adopted by Congress, they are obligatory. Beyond this, they have no controlling influence. Congress may adopt such State laws, directly, by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States " <sup>476</sup>

State laws, as we have seen, which unite or commingle legal and equitable remedies, are without force in the courts of the United States ; and we have heretofore expressed grave doubts whether it is in the power of Congress to do this. If the effect of such action is to deprive suitors in the courts of the United States of the privilege of enforcing legal and equitable rights, according to the principles of decision and modes of trial which belong respectively to law and equity, as mentioned and distinguished in the CONSTITUTION, then, our

<sup>476</sup> *Beers v. Haughton*, 9 Pet., 329.

conclusion is, it cannot be done. Not only are State laws without efficacy in matters of practice, except as sanctioned by Congress, but they cannot, by giving exclusive jurisdiction to State tribunals, prevent the Federal courts, if otherwise competent, from taking cognizance of the like cases.<sup>477</sup> A State law cannot prohibit a foreign corporation from suing in the Federal courts in the State;<sup>478</sup> and when jurisdiction has been acquired, it will not be ousted by State statute.<sup>479</sup>

Having in view the general rules of commercial law, that the payee or endorsee of a bill, upon its presentment, and upon refusal by the drawee to accept, has the right of immediate recourse against the drawer, and is not bound to wait to see whether or not the bill will be paid at maturity, a State statute, it has been held, which forbids a suit from being brought in such a case until after the maturity of the bill, can have no effect upon suits brought in the courts of the United States.<sup>480</sup> So an act of a State Legislature, which prohibits the issuance of writs of execution and mandamus against a city, has no effect

<sup>477</sup> See authorities collected in note 39, p. 36. *ante*.

In *Cowles v. Mercer county*, 7 Wall., 118, the effect of the statute of Illinois, which required all actions, local or transitory, against any county in that State, to be commenced and prosecuted to final judgment and execution in the circuit court of the county against which the action was brought, was considered. The court held that this act did not affect the jurisdiction of the Federal court. Mr. Justice Chase, delivering the opinion, says: "But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the circuit courts of the county. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in National courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution. We cannot doubt the constitutional right of the defendant in error to bring suit in the circuit court of the United States upon the obligations of the county of Mercer against the plaintiff in error, and we find no error in the judgment of that court."

<sup>478</sup> *Northwestern Life Insurance Company v. Elliott*, 7 Sawy., 1.

<sup>479</sup> *Thomas v. Police Jury*, 14 Fed. Rep., 390.

<sup>480</sup> *Watson v. Tarpley*, 18 How., 517.

as to the remedies and judgments rendered in the Federal courts.<sup>481</sup> A State statute enacting that settlements made in the county court "shall be *prima facie* evidence in favor of the accounting party," cannot operate to restrict the plenary jurisdiction of the Federal courts, sitting in equity, to enforce the trusts of a will at the suit of a legatee.<sup>482</sup> And a person who has a right under the CONSTITUTION and laws of the United States to sue in the courts thereof, cannot be compelled first to obtain the leave of the State court.<sup>483</sup> A State statute providing that all receivers appointed by any court may sue without leave of the court appointing or controlling them, can have no application to receivers appointed by the courts of the United States.<sup>484</sup>

**§ 107. Remedies at Law in the Courts of the United States as Affected by State Laws and Practice Prior to June 1, 1872.**—Whilst the Practice Act of June 1, 1872, renders it unnecessary to critically examine the laws which, long prior thereto, controlled the pleading and practice in the Federal courts, still a reference to their leading features is desirable to a proper understanding of the subject. Attention will, therefore, be directed to the several statutes in the order of their enactment.

**JUDICIARY ACT OF 1789.**<sup>485</sup>—Though mainly directed to the establishment of the courts of the United States, and to matters of substance rather than practice, this act provides for the issuance of certain writs, for the production on notice of books and documents;

<sup>481</sup> *Hart v. City of New Orleans*, 12 Fed. Rep., 292, approving and following *New Orleans v. Morris*, 3 Woods's, 115, and distinguishing *Louisiana v. New Orleans*, 102 U. S., 203.

<sup>482</sup> *Pulliam v. Pulliam*, 10 Fed. Rep., 23.

<sup>483</sup> *Phelps v. Obrien County*, 2 Dill., 518, citing as supporting the principle, *Railway Company v. Whitten*, 13 Wall., 270-285; *Snydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly's Administrator*, 18 How., 506; *Payne v. Hook*, 7 Wall., 425.

In *Phelps v. Obrien County*, *supra*, it was held that a provision of the State statutes of Iowa requiring leave of court to enable a party to sue upon a judgment, rendered in any court of the State, was not applicable to the circuit court of the United States.

<sup>484</sup> *Hale v. Duncan*, 7 Cent. L. J., 146.

<sup>485</sup> For full text of the act, see note 21, p. 21, *ante*.

for the granting of new trials, and the stay of execution to give time to file petition for new trial; for the rendition of judgment in certain cases on specialties by the court, or assessment by the jury; for the manner of serving process in case of the death or disqualification of the marshal; for drawing jurors; taking depositions *de bene esse* and *in perpetuam rei memoriam*; making executors and administrators of deceased persons parties, and the continuation of actions by surviving plaintiffs and defendants. It also gives the courts of the United States authority to make and establish necessary rules, not repugnant to the laws of the United States, for the orderly conducting business in said courts.

ACT OF SEPTEMBER 29, 1789.<sup>486</sup>—This act, which was to continue in force until the end of the next session of Congress, after making provision for the manner in which writs should be tested, declared that the forms of writs of execution (except their style) and modes of process in the circuit and district courts, in suits at common law, should be the same in each State respectively as were then used and allowed in the Supreme Courts of the same. With respect to admiralty and equity, it declared that these should be according to the course of the civil laws. It contained a further provision to the effect that where different kinds of execution were issuable, *capias ad satisfaciendum* being one of them, the plaintiff might elect to take out a *capias ad satisfaciendum* in the first instance, and pursue the same until a tender of the debt and costs, in gold and silver, should be made.

ACTS OF MAY 26, 1790, AND FEBRUARY 18, 1791.<sup>487</sup>—These acts continued in force the act of September 29, 1789, until May 8, 1792.

ACT MAY 8, 1792.<sup>488</sup>—By section 1 of this act, usually denominated the "permanent process act," some change is made in the manner of issuing and testing writs, as directed in the act of September 29, 1789.

<sup>486</sup> 1 Stats. at L., 93.

<sup>487</sup> For act of May 26, 1790, see 1 Stats. at L., 123; and for act of February 18, 1791, see 1 Stats. at L., 191.

<sup>488</sup> 1 Stats. at L., 275.

By section 2 the forms of writs of execution and other process, and the forms and modes of proceeding in suits at common law, were to be the same as were then used in the Federal courts, in pursuance of the act of September 29, 1789. And in equity and admiralty they were to be according to the principles, rules and usages belonging to courts of equity and of admiralty, as contradistinguished from courts of common law, except so far as had been provided by the judiciary act of 1789, and subject to such alterations and additions as said courts should in their discretion deem expedient, and to such regulations as the Supreme Court of the United States should think proper, from time to time, by rule, to prescribe to the circuit or district court. The effect of this and the act of September 29, 1789, was to adopt the systems of practice as they existed and were in force in the several States in 1789, subject to such alterations and additions as had been made therein by rule; and especially to adopt such State laws as might vary to advantage the forms and modes of proceeding which prevailed in 1789.<sup>489</sup> In commenting upon this act it is said: "It will be perceived that this act presupposes that in point of practice the several courts of the United States had carried into execution the provisions of the act of 1789, and had adopted the forms of process and modes of proceeding thereon which were then usual and allowed in the Supreme Courts of the respective States, and it ratifies and continues such practice, and extends it to all the proceedings in suits. This course was, no doubt, adopted as one better calculated to meet the views and wishes of the several States, than for Congress to have framed an entire system for the courts of the United States, varying from that of the State courts. They had in view, however, State systems then in actual operation, well known and understood, and the propriety and expediency of adopting which they would well judge of and determine. Hence the restriction in the act, now used and allowed in the Supreme Courts of the several States. There is no part of the act, however, that looks like adopting prospectively

<sup>489</sup> *Wayman v. Southard*, 10 Wheat., 1; *Beers v. Haughton*, 9 Pet., 329.

by positive legislative provision the various changes that might thereafter be made in the State courts. Had such been the intention of Congress, the phraseology of the act would doubtless have been adapted to that purpose. It was, nevertheless, foreseen that changes probably would be made in the processes and proceedings in the State courts which might be fit and proper to be adopted in the courts of the United States, and not choosing to sanction such changes absolutely in anticipation, power is given to the courts over the subject, with the view, no doubt, so to alter and mould their processes and proceedings as to conform to those of the State courts as nearly as might be, consistently with the ends of justice. This authority must have been given to the courts for some substantial and beneficial purpose. If the alterations are limited to mere form, without varying the effect and operation of the process, it would be useless. The power here given, in order to answer the object in view, cannot be restricted to form, as contradistinguished from substance, but must be understood as vesting in the courts authority so to frame, mould and shape the process as to adapt it to the purpose intended. The general policy of all the laws on this subject is very apparent. It was intended to adopt, and conform to, the State process and proceedings as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States.”<sup>490</sup>

ACT OF MARCH 2, 1793.<sup>491</sup>—Section 7 of this act authorizes the several courts of the United States, from time to time, to make rules and orders for their respective courts, directing the return of writs and process, filing of pleadings, taking of rules, entering of judgments and other matters in vacation, and to regulate the practice of said courts respectively, for the purpose of advancing justice and preventing delays in proceedings.

ACT OF MAY 19, 1828.<sup>492</sup>—It having been held in 1825, in the elab-

<sup>490</sup> Bank of United States v. Halstead, 10 Wheat., 51.

<sup>491</sup> 1 Stats. at L., 333.

<sup>492</sup> 4 Stats. at L., 278.

rately considered cases of *Wayman v. Southard*<sup>493</sup> and *Bank of United States v. Halstead*,<sup>494</sup> that the proceedings in the Federal courts in actions at law should be the same as they were in 1789, and that proceedings on execution, until final satisfaction, were to be governed

<sup>493</sup> 1 Wheat., 1.

<sup>494</sup> 10 Wheat., 51.

Mr. Justice Clifford, in delivering the opinion of the court in *Riggs v. Johnson County*, 6 Wall., 166, says: "Intention of Congress in passing the Process acts, was, that the forms of writs and executions, and the modes of process, and proceedings in common law suits, in the several circuit courts, should be the same as they were at that time in the courts of the respective States. Instead of framing the forms of process and prescribing the modes of process, Congress adopted those already prepared and in use in the respective States, not as State regulations, but as the rules and regulations prescribed by Congress for use in the several circuit courts. Adopted, as they were, by an act of Congress, they became the permanent forms and modes of proceeding, and continue in force wholly unaffected by any subsequent State legislation. Alterations can only be made by Congress, or by the Federal courts acting under the authority of an act of Congress.

"Practical effect of the course pursued was, that the forms of writs and executions and the modes of process and proceedings were the same, whether the litigation was in the State court, or in the circuit court of the United States. They were not always the same in different States, nor in different circuits; and, in some instances, they were widely different in the different States of the same circuit. Those diversities, or many of them, continue to the present time.

"Great diversity in the forms of real actions and of indictments were the necessary effect of the system. Different rules of pleading necessarily followed. Modes of process also were different, both in respect to mesne and final process. Attachment of personal and real property upon mesne process is allowed in one district, while the power to create any such lien in the service of such process is entirely unknown in another district, even in the same circuit. Lands of the debtor were subject to seizure and sale on execution in one district, while, in another, real property was only subject to seizure, and an extent corresponding to a modified *elegit* as at common law. Money judgments in one district became a lien upon the lands of the judgment debtor, while, in another, the judgment creditor must first seize the lands before he was entitled to any such preference.

"Remedies on judgments against municipal corporations partook of the same diversity in the different districts as that appearing in the modes of process to enforce judgments recovered against private persons. Judgment against such a corporation might be enforced in one district by levying the execution, as issued against the corporation upon the private property, personal or real, of any inhabitant of the municipality, while, in another, the appropriate remedy, in case the execution against the corporation was returned *nulla bona*, was mandamus to compel the proper officers of the corporation to assess a tax for the payment of the judgment.

"Circuit courts, by virtue of those acts of Congress, became armed with the same



by the laws in force at that date, regardless of changes by State legislation subsequently made; and no process act applicable to States admitted into the Union after 1789 having been passed for the purpose of remedying this defect in the law as to the new States, and as a legislative sanction of the view expressed by the Supreme Court in the cases above referred to, Congress passed the act under consideration, usually spoken of as the "process act of 1828." By section 1 of this act the forms of mesne process (except the style) and the forms and modes of proceeding in suits at common law, in any States admitted after September 29, 1789, were to be the same as were therein used at the time of the passage of said act in their highest courts of original and general jurisdiction, subject to such alterations and additions as the Federal courts should deem expedient, and to such regulations as the Supreme Court of the United States should, by rules, prescribe to the circuit and district courts. By section 3, all writs of execution and other final process issued on judgments and decrees, and the proceedings thereunder, were to be the same (except as to style) as those used in the State courts at the time of the passage of the act; authority being given to the Federal courts by rule to alter final process so as to conform the same to any change which might be adopted by the Legislatures of the respective States for the State courts. And in those States in which there were no courts of equity, the Federal courts were given the power of prescribing the mode of executing their decrees in equity by rules of court.

ACT OF AUGUST 1, 1842.<sup>495</sup>—By this act, the provisions of the process act of May 19, 1828, were extended and made applicable to all States admitted into the Union between May 19, 1828, and August 1, 1842. With respect to practice in States admitted between August 1, 1842, and June 1, 1872, provision was generally made in the laws

forms of writs and executions, and vested with the authority to employ the same modes of process as those in use in the State courts. Permanent effect of that wise measure was that the forms of writs and executions and the modes of process were the same, whether the litigation was in the forums of the State or in the circuit court of the United States."

<sup>495</sup> 5 Statutes at Large, 499.

admitting them, or in acts passed soon thereafter, to the effect that all laws of the United States, not locally inapplicable, should have the like force within such States as elsewhere in the United States, the result being, as a rule, to make the process act of May 19, 1828, applicable in the Federal courts of all the States admitted after August 1, 1842.<sup>496</sup> Except, then, as to matters specifically regulated by Congress, the systems of pleading and practice prevailing in the Federal courts of the different States from September 29, 1789, to June 1, 1872, were as follows: The thirteen original States were governed by the pleading and practice which prevailed in the Supreme Courts thereof, September 29, 1789. The States admitted between May 19, 1828, and August 1, 1842, were governed by the pleading and practice which prevailed in the highest courts of original and general jurisdiction of said States August 1, 1842. The States admitted between August 1, 1842, and June 1, 1872, were governed by the pleading and practice which prevailed in the highest courts of original and general jurisdiction of said States at the time of their admission.

Thus it will be seen that great diversity existed in the pleading and practice in the Federal courts, not only in the different States, but in the States belonging to the same circuit; and that the Federal and State practice was, in many and important respects, wholly dissimilar. Instead of undertaking to frame an independent code of pleading and practice, Congress, from the beginning, has preferred, in common law cases, to make the practice in the Federal courts the same as it was at the time in the courts of the respective States. Contrary to this purpose, which has been characterized as wise and as calculated to secure uniformity, the practice in the two tribunals sitting side by side in the same State, was often widely diverse, requiring the study of two separate systems in the same locality. Nor was there, in many instances, a disposition on the part of the courts, even when within their power, to conform by rule to the changes made, from time to time, in the State practice, and the divergence and inconvenience

<sup>496</sup> *United States v. Council of Keokuk*, 6 Wall., 514; *Smith v. Cokrill*, 6 Wall., 756.

resulting therefrom constantly became greater. Another difficulty presented itself in the limitation upon the authority of the courts of the United States to adopt or alter the State law *in part*, it having been very properly held that so to do would be, in effect, to legislate by prescribing a rule unknown to any act of Congress, or to the State law so adopted.<sup>497</sup> These difficulties evidently led to the passage of the act of June 1, 1872, which will be next considered.

**§ 108. Remedies at Law in Courts of United States as affected by State Laws and Practice—Act of June 1, 1872.**—Section 914, Revised Statutes, taken from section 5 of the act of June 1, 1872,<sup>498</sup> provides, “The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.”

This section, as indicated by its terms, has no application to equity or admiralty causes.<sup>499</sup> It does not confer jurisdiction upon or enlarge the jurisdiction of the Federal courts so as to extend it over persons or cases not before within their cognizance.<sup>500</sup>

In its reference to practice, it contemplates rules of practice as such, and not State legislation, which would deprive the courts of the power to control the application of rules of practice according to their discretion.<sup>501</sup> It is held not to include modes of procedure established

<sup>497</sup> *McCracken v. Hayward*, 2 How., 608.

<sup>498</sup> 17 Statutes at Large, 197.

<sup>499</sup> *Blease v. Garlington*, 92 U. S., 1; *Weed Sewing Machine Co. v. Wicks*, 3 Dill., 21; *Hill v. Mining Company*, 1 Woods's, 544; *Commonwealth v. Penn*, Pet. C. C., 496 (p. 502); *Montegio v. Owen*, 14 Blatch., 24; *Martindale v. Wass*, 11 Fed. Rep., 351, and notes to case on pp. 580, 581; *Taylor v. Holmes*, 14 Fed. Rep., 498.

<sup>500</sup> *Maine v. Second National Bank*, 6 Biss., 26; *United States v. U. P. Railroad*, 2 Dill., 527; *Nazro v. Cragin*, 3 Dill., 474. It does not modify the law as to amount necessary to give jurisdiction. *Judson v. Macon County*, 2 Dill., 213.

<sup>501</sup> *Mutual Building Fund v. Boisseaux*, 1 Hughes, 386; *Miller v. Baltimore & Ohio R. R. Co.*, 3 Cen. L. J., 809.

by judicial construction of common law remedies ;<sup>502</sup> but the Federal courts, since its passage, will follow the decisions of the State Supreme Court on questions of pleading.<sup>503</sup> It goes no further than to provide a general rule regulating practice and procedure in the Federal courts, in the absence of any express congressional enactment upon the subject, and does not by implication repeal any previous act of Congress expressly requiring a particular mode of proceeding in any given case or class of cases.<sup>504</sup> But, where Congress has not prescribed other-

<sup>502</sup> *Sandford v. Town of Portsmouth*, 6 Cen. L. J., 147.

<sup>503</sup> *Taylor v. Brigham & Kelley*, 3 Woods's, 377.

<sup>504</sup> *Wear v. Mayer*, 6 Fed. Rep., 660.

Held, by Turner J., in *Randall v. Venable*, 17 Fed. Rep., 162. that, in taking depositions under a *dedimus potestatem*, application must be made to the court before the commission could issue, and that the same must name the commissioner authorized to execute it. The opinion reviews the several provisions of the Revised Statutes on the subject of depositions, and the cases of *Beardsley v. Littell*, 14 Blatch., 102; *United States v. Pings*, 4 Fed. Rep., 714; *Con. Mut. Life Ins. Co. v. Schaefer*, 94 U. S., 458, and *Flint v. Board of Commissioners*, 5 Dill., 481. The motion to suppress the depositions, though taken in conformity to State law and practice, was sustained. It is held in the same case, reviewing the legislation of Congress on the the subject, that the power has not been conferred upon the circuit and district courts to make rules touching the mode of taking testimony.

In requiring the production of books or writings in evidence in actions at law, Federal courts are not governed by the provisions of State statutes, but by the provisions of section 724, R. S. In introducing the production of books. etc., in evidence, the court will exercise its discretion, following the practice in such cases in chancery. *Gregory v. Chicago, Milwaukee & St. Paul R. R.*, 3 McCrary, 373.

Without discussing the effect of section 914 of the Revised Statutes, a provision of the statutes of Minnesota, which provides that "when the plaintiff in any action discontinues it, or it is dismissed for any cause, and another action is afterwards commenced for the same cause between the same parties or their representatives, all depositions lawfully taken for the first action may be used in the second, in the same manner and subject to the same conditions and objections as if originally taken for the second action; provided, that the deposition has been duly filed in the court where the action was pending, and remained in custody of the court from the termination of the first action until the commencement of the second," was held binding on the Federal courts. *Gravelle v. Minneapolis & St. Louis Railway Co.*, 3 McCrary, 386.

The system of review on writ of error, established by a statute of the United States, is so far different from an appeal under the code of New York, which provides for the review of rulings excepted to on the trial, that the provisions of the State statutes do not govern the Federal courts. *Whalen v. Sheridan*, 10 Fed. Rep., 661.

wise, the practice prescribed by it must be followed, and the Federal courts have no power to substitute other modes.<sup>505</sup>

Its purpose, to use the language of the Supreme Court of the United States, "was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings, forms and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes."<sup>506</sup> And, subse-

The provisions of the Revised Statutes, section 955, govern Federal courts in matters of revivor, to exclusion of State law on same subject. *Fitzpatrick v. Domingo*, 14 Fed. Rep., 216.

In *Lanning v. Lock*, 11 Fed. Rep., 814, the practice of the State court on the subject of juries and issuable pleas requiring a jury, discussed, the court holding that juries cannot be dispensed with in common law cases in the courts of the United States.

The attorneys for the respective parties to a suit at law, brought in the district court of the United States, by a written stipulation, waived a jury trial, and agreed that the court should hear the action "without a jury." The action was tried; a written decision was filed, finding certain facts and conclusions of law therein, and a judgment entered. The cause was afterwards taken to the circuit court on a writ of error. *Held*, that the rulings on findings of fact, and the conclusions of law connected therewith, were not open to revision, as facts so found were found in a way unknown to the common law, nor yet provided by statute. *Town of Lyons v. Lyons Nat. Bank*, 8 Fed. Rep., 369.

Circuit court not required to make special finding upon issues of fact. *Marye v. Strouse*, 6 Saw., 204, citing *Ins. Co. v. Folsome*, 18 Wall., 249.

<sup>505</sup> *Perkins v. City of Waterloo*, 5 Biss., 320.

<sup>506</sup> *Nudd v. Burrows*, 91 U. S., 426.

In this case the practice act of Illinois provides that the court, in charging the jury, shall instruct them only as to the law of the case; that no instructions shall be given unless reduced to writing; that instructions asked shall not be modified by the court except in writing; that the instructions shall be taken by the jury in their

quently, in citing this case with approval, it is said by the same high authority that the section in question 'was intended to relieve the legal profession from the burden of studying and of practicing under the two distinct and different systems of the law of procedure, in the same locality, one obtaining in the courts of the United States, the other in the courts of the State, but that it was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common law powers, with which, in that respect, he is clothed.'<sup>667</sup> It is further said, in the same case, 'The conformity is

retirement, and returned with the verdict; and that papers read in evidence, other than depositions, may be carried from the bar by the jury.

Before the judge began his charge to the jury, the counsel for the defendants requested him, in giving it, to conform in all things to the practice of the courts of record, and the law of the State. This he refused to do. He also refused to allow the jury to take with them to their room the written instructions he had given them, and likewise the account book, bills of lading, and additional papers, which had been introduced in evidence, other than depositions. To each of these refusals the defendant excepted. The court say: "We see nothing in the act to warrant the conclusion that it was intended to have such an application.

"If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by the common law, were largely trenching upon.

"A statute claimed to work this effect must be strictly construed. But no severity of construction is necessary to harmonize the language employed with the view we have expressed. The identity required is to be in 'the practice, pleadings and forms and modes of proceeding.' The personal conduct and administration of the judge, in the discharge of his separate functions, is, in our judgment, neither *practice*, *pleading*, nor a *form* nor *mode of proceeding*, within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the act as we understand it.

"There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them or dictate the manner of their exercise, are interesting questions, but it is unnecessary in this case to consider them." Citing *Houston v. Williams*, 13 Cal., 24.

<sup>667</sup> *Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S., 291.

In this case it was held that a motion for a new trial is not a mere matter of proceeding or practice in the district and circuit courts, and is, therefore, not within the act of June 1, 1872, and cannot be affected by any State law on the subject. See, also, *Newcomb v. Wood*, 97 U. S., 581, in which it is said: "The plaintiff in error was not, by reason of the State law, entitled to a second trial. The agreement to submit the controversy to referees, selected or approved by the parties, implied clearly that they intended the award should be final and conclusive. The district court held this view and ruled accordingly. It has long been the established law in

required to be as near as may be'—not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose. It devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice in their tribunals. While the act of Congress is, to a large extent, mandatory, it is also, to some extent, only directory and advisory."

The application of the provisions of this section to pleadings is well illustrated by the case of *Sawin v. Kenny*,<sup>508</sup> the material facts of

the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error. We cannot think that Congress intended, by act of June 1, 1872 (17 Stat., 197, section 5), to abrogate this salutary rule." Citing *Nudd v. Burrows*, 91 U. S., 426; *Indianapolis, etc., Railroad Company v. Horst*, 93 Id., 291.

*Held*, in *United States v. Train*, 12 Fed. Rep., 852, that section 914 of the Revised Statutes does not extend to the means of enforcing or revising a decision once made, and that the object of this section was to assimilate the form and manner of presenting claims and defences in the preparation for and trial of suits to those prevailing in the State courts, and does not include statutes requiring instructions to be in writing, or permitting instructions and certain papers to be taken by the jury when they retire, or requiring the jury to be directed to find specially upon particular questions of fact, nor to the manner or time of taking a case from one Federal court to another by writ of error, bill of exceptions, or appeal. Opinion by Mr. Justice Gray.

It is held upon a review of the previous cases upon the same subject, that there is nothing in section 914 which extends to or affects the power of the circuit court, as it before existed on a writ of error to the district court. See *Town of Lyons v. Lyons Nat. Bank*, 19 Blatch., 279.

<sup>508</sup> 93 U. S., 289.

Michigan practice followed with reference to verifying pleadings. *Chickaming v. Carpenter*, 106 U. S., 663.

*Quare*: Does this act authorize court to review facts found by referee? *Boogher v. Insurance Co.*, 103 U. S., 90.

Suits to which a married woman is a party are regulated by State law. So held in a case in which a married woman was joined with her husband in an action of ejectment. *Tilton v. Barrell*, 14 Fed. Rep., 609.

*Held*, in *United States v. Phelps*, decided March 26, 1883, Supreme Court United States, 2 Sup. Ct. Rep., 338, that the laws of New York would govern as to when a suit would be deemed to have been brought or commenced, etc.

which were: Kenny and Foley brought suit in the Circuit Court of the United States for the eastern district of Arkansas, against one Sawin and the Little Rock, Pine Bluff and New Orleans Railroad Company, upon a contract, which, on its face, appeared to have been

Act giving new remedy against corporations, in lieu of sequestration, enforced. Iron City National Bank v. Siemens Anderson Steel Co., 14 Fed. Rep., 150.

Under Tennessee code, assignee of bill of lading may sue in his own name. Robinson v. Memphis & C. R. R. Co., 16 Fed. Rep., 57; see Robinson, McLeod & Co. v. Memphis, etc., R. R. Co., 9 Fed. Rep., 129; Pollard v. Vinton, 105 U. S., 7.

Suit must be brought by a married woman according to Louisiana code. Meyerson v. Alter, 11 Fed. Rep., 688.

Where set-off is allowed by laws of State, same will be allowed by Federal courts. Citing West v. Aurora City, 6 Wall., 139. Partridge v. Insurance Co., 15 Wall., 573

Missouri practice, touching counter-claim in tort, considered in Gentry v. Grandview Mining and Smelting Co., 13 Fed. Rep., 843.

When replevin will lie under State law. Wood v. Weimer, 104 U. S., 786.

Remedy by attachment provided by State laws adopted. Mather v. Nesbit, 13 Fed. Rep., 872; see, also, Allen, West & Bush v. Clayton & Prewett, 3 McCrary, 198.

Laws of Louisiana followed in attachment cases, as to amount of bond, in Fleitas v. Cockrem, 101 U. S., 301.

Act of June 1, 1872, construed applicable to legal action authorizing real party in interest to sue. Weed Sewing Machine Co. v. Wicks, 3 Dill., 261.

State law authorizing suit to be brought in name of real party in interest, and touching abatement of action, considered in Elliott v. Teal, 5 Saw., 188.

As to suits by assignee, who takes assignment of action founded on tort, see Northern Ins. Co. v. St. Louis S. R. R. Co., 15 Fed. Rep., 840.

Actions of tort and actions *ex contractu* may be blended in Tennessee. Hall v. Memphis & Charleston R. R. Co., 15 Fed. Rep., 57, citing Jerman v. Stuart, 12 Fed. Rep., 266.

State practice conformed to in making landlord party to real action. State v. Lewis, 14 Fed. Rep., 65.

Law of State requiring corporation to have agent upon whom process can be served, sustained. Semper v. Bank of British Columbia, 5 Sawy., 88, citing *In re Comstock*, 2 Sawy., 218.

Where, by local law, a foreign corporation is amenable to suit in the courts of the State, service being made upon an agent within the State, the Federal courts may be regarded as courts of the State, and may take jurisdiction upon such service as would be good in a State court. Eaton v. St. Louis Shakespear Mining and Smelting Co., 2 McCrary, 362; Stout v. Sioux City, etc., R. R. Co., 3 McCrary, 1; Brownell v. Troy, etc., R. R. Co., 18 Blatch., 243.

State law in reference to joint judgments applied. Allen, West & Bush v. Clayton & Prewett, 3 McCrary, 517. See, also, United States v. Spiel, 3 McCrary, 107.

New York code, touching joinder of actions, considered. Sullivan v. N. Y., N. H. & H. R. R. Co., 11 Fed. Rep., 848.



executed by and to bind only Sawin, of the one part, and Kenny and Foley of the other. Kenny and Foley, in their complaint, alleged that though the contract was executed in the name of Sawin alone, it was, in fact, the contract of the railroad company, and that Sawin, by

The practice, concerning references in trials at law, conformed to. *Robinson v. Mutual Benefit Life Ins. Co.*, 16 Blatch., 194. See page 201.

A reference by consent in an action at law, in conformity to the law and practice of New York, is permissible. *Robinson v. Mutual Benefit Life Insurance Co.*, 16 Blatch., 194.

But court has no power, notwithstanding the act of June 1, 1872, to refer a suit at common law to a referee for trial without consent of both parties to suit. *The Howe Sewing Machine Co. v. Edwards*, 15 Blatch., 402.

The State practice, concerning the rendition of judgment according to the facts proved, adopted in *Whalen v. Sheridan*, 17 Blatch., 9. See page 15.

The right tooyer, in a proper case, is a part of the common law system of special pleading, which, in a modified form, has obtained in this court from its first organization. *Hammer v. Klein*, 1 Bond, 590.

The New York code abolishes pleas in abatement, and allows the question to be raised by special denial in the same answer in which the defendant pleads to the merits, but not by general denial. Under the authority of act of June 1, 1872, *held*, that the practice under the New York code on this subject would be followed, and that it was not necessary to present the issue of citizenship by plea in abatement, as formerly required under the old system of pleadings. *Draper v. Town of Springport*, 15 Fed. Rep., 328.

*Held*, in *Baltimore & Ohio R. R. Co. v. Hamilton*, 16 Fed. Rep., 181, that, as the laws of Virginia do not admit the action of replevin, the writ of replevin will not issue from the circuit court of the United States sitting in that State.

Where State law allowed defendant in ejectment a new trial on payment of costs, it is binding on Federal court. *Hiller v. Shattuc*, 1 Flipp., 272.

For a case in which it was held that process must be endorsed in conformity to State law, see *Brown v. Pond*, 5 Fed. Rep., 31.

But process from the court of the United States must be signed by the clerk and sealed with the seal of the court. *Dwight v. Merritt*, 4 Fed. Rep., 614; *Peaslee v. Haberstro*, 15 Blatch., 472.

Where, by the practice and procedure of the State courts of record in the district, the costs and expenses of viewing the ground by the jury in civil actions are allowed, such costs and expenses may be allowed in the courts of the United States, held within such district, in civil suits other than suits in equity or admiralty, under the provision of section 914 of the Revised Statutes, which adopts, as near as may be, the practice, pleadings, forms and modes of procedure of the State courts of the district in which such United States courts are held. *Huntress v. Town of Epsom*, 15 Fed. Rep., 732.

Actions for penalties brought in the name of the United States correspond with those brought by the State in the name of "The People of the State of New York;"

signing it, became liable jointly with the company for the performance of its obligations. The company denied the execution of the contract by the company, and claimed that Sawin alone was bound by it, and Sawin offered to let judgment go against him for \$2500. The trial resulted in a verdict in favor of the company, but against Sawin. Sawin moved in arrest of judgment upon the ground that no cause of action was stated or shown against him. The motion was overruled, judgment entered on the verdict, and the case carried to the Supreme Court on writ of error. Mr. Chief Justice Waite, in delivering the opinion, said: "We think the court below decided correctly. By the code of practice of Arkansas which was in force when this judgment was rendered, it was provided that 'where two or more persons are jointly bound by contract, the action thereon may be brought

and, by section 914, Revised Statutes, the provisions of the New York code of procedure, in regard to such actions by "The People," etc., are applicable to similar actions brought here in the name of "The United States," and the summons served must therefore be endorsed with a general reference to the statute by which the action for the penalty is given. This endorsement is part of the process, and being designed to give immediate notice of the nature of the action, is a material part, and if omitted is not amendable, and the service of the summons should be set aside. *United States v. Rose*, 14 Fed. Rep., 681.

By the code of New York, fourteen days notice is required for the hearing of demurrer. *Held*, that this notice must be given in the Federal courts in that State as a matter of practice, within the meaning of section 914; and that if the rules of the court allowed a shorter time, they were abrogated by the act of June 1, 1872. *Rosenbach v. Dreyfuss*, 2 Fed. Rep., 23.

The practice act of the State of New Jersey (sections 103, 104), requires the plaintiff to file his declaration against the defendant within thirty days after being returned "summoned," and the defendant his plea within thirty days after the expiration of the time limited or granted for filing the declaration; and provides (section 110) that if any party shall not file his pleading in the cause within the time required by law, and shall file the same after the expiration of such time, he shall give the adverse party notice in writing of the time of filing such pleading, and that the adverse party shall not be required to plead in reply thereto until ruled so to do. *Held*, under such statute, where a declaration was not filed within the time required by law, but within the time in which the defendant consented that it might be filed, that the defendant was not required to plead until so ruled by the plaintiff. *Richard v. Inhabitants of Township of New Providence*, 5 Fed. Rep., 433.

Under section 542 of the New York code, as applied by section 914 of the Revised Statutes to the practice and pleading in the circuit and district courts within the State of New York, a complaint is amendable by the party at any time within twenty days after a demurrer thereto. *Rosenbach v. Dreyfuss*, 1 Fed. Rep., 391.

against all or any of them, at the plaintiff's option' (section 4480, Gaunt's Dig., 1874); 'that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants' (section 4701); and that, 'though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgment against such defendants if the action had been against them alone' (section 4704). This, under the act of June 1, 1872 (17 Stat., 187, section 5; Rev. Stat., 914), furnished a rule of practice for the courts of the United States in that State: Clearly, in this case, if the action had been brought against Sawin alone, judgment could have been entered against him on this verdict. He, in his answer, acknowledged his liability upon the contract, which is the foundation of the action, and offered to confess judgment for \$2500. After that, as between him and the plaintiffs, the only question was one of amount. Substantial justice has, therefore, been done between these parties; and, by the operation of these remedial provisions of the code, the sacrifice of substance to mere form and mode of proceeding has been prevented."

In *Chemung Bank v. Lowery*,<sup>509</sup> the principal question presented

<sup>509</sup> 93 U. S., 72.

Mr. Justice Bradley, by whom the opinion of the court was delivered, in considering the point mentioned in the text, said: "As to the first assignment, it is undoubtedly true that the statute of limitations cannot, by the English practice, be set up by demurrer in actions at law, though it may be in certain cases in suits in equity. And this rule obtains wherever the English practice prevails. But where the forms of proceeding have been so much altered as they have been in Wisconsin, further inquiry must be made. In the first place, by the Revised Statutes of that State, passed in 1858, in the title 'Of Proceedings in Civil Action,' it is declared that 'the distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.' (Rev. Stat., 714.) Secondly, 'that all the forms of pleading heretofore existing are abolished. The act proceeds to declare that the first pleading on the part of the plaintiff is the complaint, which shall contain, amongst other things, 'a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.' (Rev. Stat., 721.) It provides that the defendant may demur, for certain causes, but that

in the court below was, whether or not the statute of limitations could be set up by demurrer in an action at law in the circuit court of the United States. Upon demurrer setting up the statute, the court below gave judgment for the defendant, and it was contended in support of the judgment that, as the practice in the State courts of Wisconsin authorized such defense by demurrer, the Federal courts, under act of June 1, 1872, were bound to recognize and give it like effect, and the contention was sustained. When the statutes of a State, in regard to practice in the courts of record, require the plaintiff in a suit upon a written instrument to file with his declaration a copy of the instrument sued upon, and copies of the bonds and coupons sued upon are filed with the declaration in the United States circuit court, they, in this way, become a part of the pleadings in the case.<sup>510</sup> The provision of the code practice of Missouri, to the effect that if any one of the defenses set up in the answer is a bar to

other defenses must be taken by answer. (Id.) Amongst the grounds for demurrer, one is, 'that the complaint does not state facts sufficient to constitute a cause of action.' In another title—'Of the Limitation of Actions,'—it is provided that 'the objection that the action was not commenced within the time limited, can only be taken by answer.' (Rev. Stat., 819.) But the Supreme Court of Wisconsin has decided that, when on the face of the complaint itself it appears that the statutory time has run before the commencement of the action, the defense may be taken by demurrer, which, for that purpose, is a sufficient answer. (*Howell v. Howell*, 15 Wis., 55.) This case has been recognized in later cases (see *Tarbox v. Supervisors*, 34 Wis., 561), and must be regarded as expressing the law of the State. On the first hearing of the case of *Howell v. Howell*, some importance was attached to the fact that it was an equity case, in which class of cases a demurrer has been allowed for setting up the statute of limitations; but, on a rehearing, a more enlarged view was taken, and a demurrer was regarded as sufficient in all cases where the lapse of time appears in the complaint without any statement to rebut its effect, and where the point is specially taken by the demurrer. If the plaintiff relies on a subsequent promise, or on a payment, to revive the cause of action, he must set it up in the original complaint, or ask leave to amend. Without this precaution, the complaint is defective in not stating, as required by the statute, facts sufficient to constitute a cause of action. But, although defective, advantage cannot be taken of the defect on motion or in any other way than by answer, which answer, however, as we have seen, may be a demurrer.

"As this is the law of Wisconsin, the Circuit Court of the United States for the western district of Wisconsin is bound by it; and, as the decision in the principal case accords therewith, the first assignment of error cannot be sustained."

<sup>510</sup> *Nauvoo v. Ritter*, 97 U. S., 389.

the plaintiff's right to recover, a demurrer to the whole answer must be overruled, has, in its application to the United States circuit court of that State, been sustained.<sup>511</sup> And so it has been held under the code practice of Louisiana, as applied to the United States circuit court sitting within that State, that a suit might be brought and distinct judgments rendered against a defendant as administratrix of her deceased husband, as widow in community, and as tutrix of minor heirs.<sup>512</sup> In a case from Illinois, where the common law rules of pleading and the distinction between forms of action still prevail, it was held that a declaration in an action of covenant averring a parol contract would be bad on demurrer, because contrary to the rules of pleading in the common law, and to the act of Congress, which requires the circuit courts to conform to the mode of pleading of the State in which the court sits.<sup>513</sup> It was held by Mr. Justice Miller, on the circuit, that, as by the practice and statutes in Iowa motions are parts of the record and are reviewable on error, the Federal court in that State may, on writ of error to the district court, review a ruling on a motion to the jurisdiction.<sup>514</sup>

Motions in a suit at common law, which are required by the practice of the State courts of New York to be made at a special term of a State court, may be made at a stated term of the Federal court.<sup>515</sup> And, under the system of pleading adopted in said State, the Federal courts conforming thereto will, in trials at law, render judgment in accordance with the facts pleaded, without regard to the form of the pleadings or the theory on which they were prepared.<sup>516</sup> Where an action has been removed from the State court to a circuit court, the latter may, in accordance with the State practice, grant the plaintiff leave to amend his declaration by inserting new counts for the same

<sup>511</sup> *County of Dallas v. McKenzie*, 94 U. S., 660.

<sup>512</sup> *Kittredge v. Race*, 92 U. S., 116.

<sup>513</sup> *Phillips & Colby Construction Co. v. Seymour*, 91 U. S., 646.

<sup>514</sup> *Nazro v. Cragin*, 3 Dill., 474.

<sup>515</sup> *Emma Silver Mining Co. v. Park*, 14 Blatch., 411.

<sup>516</sup> *Whalen v. Sheridan*, 17 Blatch., 9.

cause of action as that alleged in the original counts.<sup>517</sup> And where the State statute provides that no action shall be defeated on account of the misjoinder of parties, if the matter in controversy can be properly dealt with and settled between the parties before the court, and that the court may order any party improperly joined to be stricken out, the same practice will be adopted by the United States courts held in that State.<sup>518</sup>

**§ 109. Same—Attachment and other Process against Property of Defendant.**—Section 915 of the Revised Statutes, taken from section 6 of the act of June 1, 1872, provides that: "In common law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process; provided, that similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."<sup>519</sup>

<sup>517</sup> *West v. Smith*, 101 U. S., 263.

<sup>518</sup> *Perry v. Mechanics Mut. Ins. Co.*, 11 Fed. Rep., 478.

<sup>519</sup> Circuit courts of the United States give effect to the attachment laws of the State, and are bound by the construction placed upon such laws by the Supreme Court of the State. *Lehman v. Berdin*, 5 Dill., 340.

*Held*, in Maryland, that the funds in the hands of the assignees appointed by the court as trustees in insolvency proceedings under State insolvent laws, are not subject to attachment by non-resident creditors of the insolvent. *Torrens v. Hammond*, 10 Fed. Rep., 900.

*Held*, in Massachusetts, that, under the law of that State, the wages of a seaman cannot be attached by trustee process before the voyage on which they are earned is terminated. *The Lizzie Williams*, 11 Fed. Rep., 619.

For a case discussing the Ohio attachment law, see *McCracken v. Covington City National Bank*, 4 Fed. Rep., 602.

For a case in which the attachment law of Arkansas was applied, see *Mack & Co. v. McDaniel*, 4 Fed. Rep., 294.

A public officer charged with a trust created by a public statute in respect to funds

This provision does not enlarge the jurisdiction of the courts of the United States so as to embrace writs of foreign attachment and thus enable them to acquire jurisdiction over persons in districts other than those wherein they reside.<sup>520</sup> But Congress has conferred jurisdiction as to suits against non-residents commenced by attachment in State

in his possession cannot be liable in respect to them by an attachment in favor of a person, not claiming under the trust. *Providence and Stonington Steamship Co. v. Virginia Fire and Marine Ins. Co.*, 11 Fed. Rep., 284.

Where the laws of a State authorize the amendment of an affidavit by inserting a new ground for an attachment, there is no objection thereto. *Fitzpatrick v. Flanagan*, 106 U. S., 648. In above case the practice of the circuit court in Mississippi, treating as separate judgment sustaining the attachment and the personal final judgment on the merits, was recognized, and were considered by the Supreme Court as separate on writ of error.

In Vermont a deputy sheriff can maintain an attachment of personal property on the farm of a judgment debtor who does not reside upon it, through a receiptor, who obtains the record title to the farm for the purpose of keeping such property there, and the direction and control of the agents of the debtor in charge of the farm for him, one of whom was placed in chief control after the attachment was made. *Dudley v. La Moille National Bank*, 14 Fed. Rep., 217.

Under the statute of Colorado attachment is not allowed in actions of trespass to mines, even though the plaintiff elect to waive the trespass and sue as for money had and received by defendant to his use. *Tabor v. Big Pittsburg Consolidated Mining Co.*, 14 Fed. Rep., 636.

*Held*, in a case in Arkansas, that to constitute and preserve an attachment of personal property, capable of manual delivery, the officer must take the property into custody and continue in the actual possession of it by himself, or by an agent appointed by him for the purpose; and further, where writs of attachment issue from a Federal and State court against the same defendant, the one under which the property is first actually taken into custody has priority, without regard to the date of respective writs; and the United States marshal and sheriff cannot make a joint and partnership levy, nor can one of these officers make a levy subject to the prior levy of the other. *Adler, Goldman & Co. v. Roth, et al.*, 2 McCrary, 445.

Under section 915, a circuit court administers the law of the State in which such court is held regarding attachments; and when property has been attached in a suit in the United States court by the marshal, and the sheriff has levied an attachment issued from a State court on the goods in the hands of the marshal, the priority of the lien of the attaching creditors is to be determined by the State law. *Bates v. Days*, 17 Fed. Rep., 167.

<sup>520</sup>*Ex Parte Railway Co.*, 103 U. S., 794; *Chittenden & Co. v. Darden & Holston*, 2 Woods's, 437; *Nazro v. Cragin*, 3 Dill, 474; *Mauldin v. Carel*, 3 Hughes, 249; *Anderson v. Shaffer*, 10 Fed. Rep., 266.

courts and removed into United States courts.<sup>521</sup> And where a cause is removed from a State court to the circuit court of the United States, the latter court has the power, where such practice is authorized by the State law, to entertain a motion to dissolve an attachment or discharge the attached property.<sup>522</sup> The writ cannot be issued by a commissioner of the circuit court of the United States, notwithstanding a State statute gives power to a justice of the peace to issue an attachment returnable, in certain cases, to the superior courts of the State.<sup>523</sup> Nor will a motion to dissolve an attachment against the objection of the adverse party be heard by a judge of the United States circuit court in vacation, although such practice is sanctioned by State law.<sup>524</sup>

A plaintiff in attachment in the Federal courts must furnish security in the same manner, as to amount and qualification and residence of the sureties, that the laws of the State require to be furnished if he were proceeding in the courts of the State.<sup>525</sup> And when, under the law of a State, as held by its highest court, the remedy by attachment is void if the declaration is demurrable, the Federal courts will, in such case, quash the attachment.<sup>526</sup> So, a State statute which provides that judgment may be rendered "for or against one or more of several defendants," according as the proof may warrant, is as applicable to suits by attachment as to suits in any other form; and where

<sup>521</sup> *United States v. Ottman*, 1 Hughes, 313.

<sup>522</sup> *Garden City Mfg Co. v. Smith*, 1 Dill., 305.

When a contingency arises, whereby the attachment would be dissolved under the provisions of the State law, the attachment will be deemed dissolved in a Federal court, as provided in section 933 of the Revised Statutes. *Mather v. Nesbit*, 13 Fed. Rep., 872.

<sup>523</sup> *Chittenden & Co. v. Darden & Holston*, 2 Woods's, 437.

<sup>524</sup> *Clafin v. Steinberg*, 2 Dill., 324.

<sup>525</sup> *Singer Mfg Co. v. Mason*, 5 Dill., 488.

Where, under the law of the State, an attachment bond is required to be in a sum exceeding by one-half the claim of the creditor, it is binding upon the Federal courts sitting within the State. *Fleitas v. Cockrem*, 101 U. S., 301.

<sup>526</sup> *Third National Bank v. Teal*, 5 Fed. Rep., 503.



an attachment is sued out against two persons jointly, it may be entertained against the separate property of one alone.<sup>527</sup>

§ 110. Same—Execution and other Process on Judgment.—Section 916, Revised Statutes, also taken from section 6, of Act of June 1, 1872, provides: "The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."<sup>528</sup>

<sup>527</sup> Allen, West & Bush v. Clayton & Prewett, 11 Fed. Rep., 73.

<sup>528</sup> In *Ex Parte Boyd*, 105 U. S., 647, after quoting this section, the court say: (pp. 651, 652). "This provision of the Revised Statutes merely embodies and extends the principle contained in the fourteenth section of the act of September 24, 1789, chapter 20 (1 Stat., 81), which, with the subsequent legislation of Congress in furtherance of it, has been repeatedly the subject of consideration in this court. *Palmer v. Allen*, 7 Cranch, 550; *Wayman v. Southard*, 10 Wheat., 1; *Bank of the United States v. Halsted*, 10 Id., 51; *Boyle v. Zacharie*, 6 Pet., 648; *Beers v. Haughton*, 9 Id., 329; *Ross v. Duval*, 13 Id., 45; *United States v. Knight*, 14 Id., 301; *Duncan v. Darst*, 1 How., 301; *McCracken v. Hayward*, 2 Id., 608; *Homer v. Brown*, 16 Id., 354.

"It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several States, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to all proceedings thereupon, as in *Beers v. Haughton* (*supra*), where it was held to include proceedings on the part of the judgment debtor for his exoneration under insolvent laws of the State from imprisonment under a *ca. sa.*, and the consequent discharge from liability of the special bail."

Under the laws of Indiana the "timely" issue of a second execution does not continue the lien of the first execution in the absence of a levy under such first execution. *Kregelo v. Adams*, 3 Fed. Rep., 628.

*Held*, in *McWilliams v. Withington*, 7 Fed. Rep., 326, that the interest which a person has under a time purchase from the State, while the contract remains in force, is property subject to sale upon execution; that the purchaser at such sale has right

This section authorizes, as a matter of procedure, a resort to the remedies known as proceedings supplementary to execution given by State statutes for the purpose of reaching the property of the judgment debtor.<sup>520</sup> A creditor, however, is not restricted to such proceedings, but may, in a proper case, notwithstanding the State law, file his bill in equity, having in view the same purpose.<sup>530</sup> It is the

to make the annual payments and perfect the title. *Held, further*, that in the absence of any false representation as to the extent of his interest or contract at the date of the mortgage under which the property is sold, it is not the duty of the mortgagor to perfect the title by making the annual payments; that the proper remedy of a purchaser at execution sale is by motion in the same suit, in case of a total failure of title, and that section 1300 of the compiled laws of Nevada is a rule of decision.

The statute of Colorado provides that no writ of *scire facias*, or other writ of execution, shall bind the estate of the defendant, but from the time such writ is delivered to the sheriff to be executed, which will be protected in bankruptcy, and will not be defeated by a petition in bankruptcy, filed after the delivery but prior to the levy of the execution. *Bartlett v. Russell*, 4 Dill., 267.

Under the law of Indiana, the lien of an execution upon personal property (no levy having been made under it), does not continue after its expiration, upon the issue of an *alias* execution, so as to cut off the lien of another execution, properly in the hands of the officer when the *alias* was issued. The lien of the *alias* relates only to the time when it was placed in the hands of the officer. *Kregelo v. Adams*, 9 Bissell, 343.

Under the laws of New York, the lien of a judgment, except as against *bona fide* purchasers for value, and subsequent judgment creditors, attaches to the goods and chattels of the debtor from the time the execution is issued to the sheriff to be executed, though no levy is made, and such lien does not become dormant merely by virtue of instructions to the sheriff to delay his levy. *Crane v. Penny*, 2 Fed. Rep., 187.

Statute of Minnesota, touching joint judgments, considered in *United States v. Speil*, 3 McCrary, 107.

<sup>529</sup> *Ex Parte Boyd*, 105 U. S., 647. We have already extracted from this opinion that the proceeding was not in conflict with the Constitution, distinguishing between law and equity.

<sup>530</sup> *Frazer & Chalmers v. Colorado Dressing and Smelting Co.*, 5 Fed. Rep., 163. S. C., 2 McCrary, 11.

When a party has obtained a judgment in a State court against a corporation, on account of whose insolvency he is unable to collect the same, he may file his bill in equity in a national court, to oblige the debtors of the corporation to pay the judgment, if the citizenship of the parties to the bill will confer the jurisdiction according to the provisions of the Judiciary Act. The Indiana code of procedure, which gives certain equitable remedies in courts of law, is, as to these, cumulative only; and it does not take from courts of equity those remedies which existed before the code was adopted. *Putnam v. New Albany*, 4 Bissell, 365.

effect of this section to apply State exemption laws as to executions issuing from the Federal courts, and it has been settled that the homestead of a defendant is not subject to seizure and sale by virtue of an execution sued out on a judgment recovered by the United States in a civil action, if, had a private party been the plaintiff, it would be exempt therefrom by the law of the State where it is situate.<sup>531</sup>

Lands held by a city for public purposes, or ground rents arising therefrom and forming a part of its public revenues, are not subject to seizure and sale by virtue of an execution issuing from the circuit court of the United States.<sup>532</sup> And while State laws, in relation to remedies upon judgments extending to execution liens,<sup>533</sup> are followed by the Federal courts, a State law which prohibits the issuance of an

<sup>531</sup> *Fink v. O'Neil*, 106 U. S., 272. The contrary conclusion was reached in *United States v. Howell*, by Dick J., Western District N. C., October, 1881, 9 Fed. Rep., 674.

<sup>532</sup> *Klein v. New Orleans*, 99 U. S., 149; *Amy v. City of Galena*, 7 Fed. Rep., 163.

The statute of a State provided, among other things, that when, upon the recovery of a judgment against a municipal corporation, and the levy of an execution thereunder, sufficient property is not found to satisfy the same, a copy of such process shall be served on the collector and assessor, who shall then make the assessment and levy the required amount. *Held*, that a writ of *mandamus*, commanding the city council to provide for the payment of the judgment, will not be granted, in the absence of proof that the requirements of the statute have been complied with. *Moran v. City of Elizabeth*, 9 Fed. Rep., 72.

<sup>533</sup> *Ward v. Chamberlain*, 2 Black, 430; *Brown v. Pierce*, 7 Wall, 205.

Where a judgment was obtained in the circuit court of the United States for the district of Mississippi, in 1839, and, in 1841, the State of Mississippi passed a law requiring judgments to be recorded in a particular way in order to make them a lien upon property, *held* that this statute did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded, as required by the statute. *Massingill v. Downs*, 7 How., 760.

A judgment rendered by the United States Circuit Court for the western district of Texas is a lien upon all the lands of the defendant within the district, without being recorded in the several counties where his lands lie; per Mr. Justice Bradley in *United States v. Scott*, 3 Woods's, 334. See, also, *Ludlow v. Clinton Line R. Co.*, 1 Flipp., 25; *Carroll v. Watkins*, 1 Abb., U. S., 474; *Cropsey v. Crandall*, 2 Blatch., 341.

And it has been held that the lien of a judgment obtained in an United States court is operative from its date upon real estate situated in all parts of the State, notwithstanding the State is divided into two or more judicial districts of the United States. *Prevost v. Gorrell*, 5 Reporter, 616.

execution against a city has no effect as to the remedies on judgments rendered in said courts.<sup>534</sup>

§ 111. Remedies in Equity in Courts of United States as affected by State Law. — Section 913, Revised Statutes, provides that "The forms of mesne process, and the forms and modes of proceeding in suits of equity, and of admiralty and maritime jurisdiction, in the circuit and district courts, shall be according to the principles, rules and usages which belong to courts of equity, and of admiralty, respectively, except when it is otherwise provided by statute, or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed from time to time to any circuit or district court, not inconsistent with the laws of the United States." Taking this in connection with the succeeding section (914), which, in assimilating Federal and State practice *at law*, expressly excepts from its operation causes *in equity*, and looking to some of the decisions under the prior law, it would seem that in the courts of the United States equitable remedies were to be administered without any regard whatever to State laws, and where not otherwise provided by act of Congress, or rules of court made in pursuance thereof, the practice in equity was to be regulated solely by the principles, rules and usages of the High Court of Chancery in England, as it existed at the time of the formation of the Federal Constitution.<sup>535</sup>

<sup>534</sup> Hart v. City of New Orleans, 12 Fed. Rep., 292.

<sup>535</sup> In *Fontain v. Ravenel*, 17 How., 369, it is said (p. 384): "The courts of the United States cannot exercise any equity powers except those conferred by acts of Congress, and those judicial powers which the High Court of Chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States." See, also, *Pennsylvania v. Wheeling Bridge Co.*, 13 How., 518 (p. 563); *Vattier v. Hinde*, 7 Pet., 252; *Loring v. Marsh*, 2 Cliff., 469; *Fletcher v. Morey*, 2 Story, 555.

The equity practice of the Federal courts, when not controlled by an act of Congress or the rules prescribed by the Supreme Court, is, in general, regulated by the chancery practice of the parent country as it existed prior to the adoption of what are called the "New Rules." *Goodyear v. The Providence Rubber Co. et al.*, 2 Cliff., 351.

But, as we have seen, State laws conferring, enlarging and altering primary rights are recognized and enforced in equity, thus influencing, with respect to *subject matter*, the equitable jurisdiction of the courts of the United States.<sup>536</sup>

Indeed, we find it asserted, without qualification, in one case, that "The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the State courts. If in the latter courts equity would afford no relief, neither will it in the former."<sup>537</sup>

We have also noticed that remedies given by State laws are not unfrequently enforced in equity in the courts of the United States, the mode of remedy which could not have been known to the English chancery being sometimes adopted.<sup>538</sup> The question then arises, what are the true rules on the subject? We understand them to be:

Equity Rule, 90, reads: "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

This rule neither enlarges nor limits the equitable jurisdiction of the courts of the United States. It merely regulates the practice in cases where the court has jurisdiction in particulars not otherwise specially provided by rule. *Lewis v. Shainwald*, 7 Sawy., 403. It is the practice of the English Court of Chancery and not that of the Court of Exchequer, which forms the basis of equity practice of the courts of the United States. *Smith v. Burnham*, 2 Sumn., 612.

<sup>536</sup> See p. 312, *et seq.*, and note 408, p. 320, *ante*.

<sup>537</sup> *Ewing v. City of St. Louis*, 5 Wall., 413.

In above case a bill was filed to enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of a street in that city, and setting forth as grounds of relief want of authority in the mayor, and various defects and irregularities in the proceedings. A demurrer, on the ground that a court of equity had no jurisdiction of the matter, and that the complainant had a plain, adequate and complete remedy at law, was sustained.

In *Gaines v. Chew*, 2 How., 619, it is said (p. 650): "But the circuit court of the United States exercising jurisdiction in Louisiana, as in every other State, preserves distinct the common law and chancery powers. In either the State or Federal court the relief is the same; the difference consists only in the mode of giving it."

<sup>538</sup> See section 101, p. 328, and notes, *ante*.

1. State laws abrogating the distinction between legal and equitable remedies are without force in the courts of the United States.

2. State laws giving relief at law, which equity alone could previously give, do not affect the equitable jurisdiction of the courts of the United States.

3. Remedies given by State laws, though unknown to the English chancery, may be enforced on the equity side of the courts of the United States, provided they conform substantially to chancery procedure, and are not inconsistent with the laws of Congress or the rules of court made in pursuance thereof.

The first of these rules is founded upon the distinction between law and equity as recognized in the Constitution and laws of the United States,<sup>539</sup> and, notwithstanding the disposition in some instances of the courts below to ignore it, the Supreme Court of the United States has upheld it with a steady hand.<sup>540</sup> The cases of *Gaines v. Relf*,<sup>541</sup> and *Ex Parte Myra Clark Whitney*,<sup>542</sup> which arose in Louisiana, where

<sup>539</sup> *Cropper v. Coburn*, 2 Curtis, 465. See chapter 1, *ante*.

<sup>540</sup> See authorities collected in note 26, p. 28, *ante*.

<sup>541</sup> 15 Pet., 9.

<sup>542</sup> 13 Pet., 404.

The fact that in Louisiana titles are registered in a public office, does not affect complainant's right to call for discovery. *Gaines v. Mauseaux*, 1 Woods's, 118.

The court will not take cognizance of a case in equity in which parties agree upon a statement of facts and stipulate that the court shall take jurisdiction, try the cause, and render decree without pleadings. The statute of Kansas, authorizing such a proceeding in the courts of that State, confers no jurisdiction upon this court, sitting as a Federal court of equity, nor does it change the chancery practice in this court in any respect. *Nickerson v. Atchison, Topeka & Santa Fe R. R. Co.*, 1 McCrary, 383.

There is manifest error in subjecting parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the State, because the proceedings in the Federal courts, sitting in equity, are regulated by the laws of Congress and the rules of the Supreme Court of the United States, made under authority of such laws. The ninetyeth equity rules declare that, when not otherwise directed, the practice of the Court of Chancery of England should be followed. And the eighth rule authorizes the circuit court, both judges concurring, to modify the practice in their respective districts; but this applies only to forms of proceeding and mode of practice, and would not authorize the adoption of the law of the State defining the rights and obligations of parties to an injunction bond; and in each State a court of

the distinction between legal and equitable remedies, as at common law, was unknown to the local jurisprudence of the State, may be used for illustrations. A bill was filed, in 1836, on the equity side of the United States district court in that State. The judge entered, March 9, 1837, the following order: "In this case, having maturely considered the prayer for oyer and for copies of bill in French, the court this day delivered its written opinion thereon, whereby it is ordered, adjudged and decreed that the application for oyer of documents, and for copies of the bill of complainant in the manner prayed for (in French), be granted; and further, that all future proceedings in this case shall be in conformity with the existing practice of this court." Judge Harper, by whom the order was

the United States will grant an injunction according to established principles of equity, and not according to the laws and practice of a State in which there is no court of chancery, as contradistinguished from a court of common law. *Bien v. Heath*, 12 How., 168. See, also, *Boyle v. Zacharie*, 6 Pet., 635, and *Deakin v. Stanton*, 3 Fed. Rep., 435.

The practice in some of the States to allow new matters to be set up in an answer, so as to operate as a cross bill, is inadmissible in the equity practice in the courts of the United States. *Hubbard v. Turner*, 2 McLean, 519.

Where a bill is filed to quiet title, defendant cannot, in same case, set up claim to recover property and rents. *Hurt v. Hollingsworth*, 100 U. S., 100.

The law of a State which authorizes the defendant to propound interrogatories in his answer, which the complainant is compelled to answer as if propounded in a cross bill, should not be followed in equity causes in the Federal courts. *McDonald v. Smalley*, 1 Pet., 620.

The proceeding by new trial and intervention, according to Louisiana State practice, instead of by rehearing, as in chancery, is irregular. *United States v. Curry*, 6 How., 106.

The statute of Nebraska regulating the practice of the State courts in determining applications for new trials, is not binding upon the circuit court when exercising its chancery jurisdiction; and the limitation in the State statute which forbids the State courts to grant new trials after one year, so far from being a limitation upon the circuit court sitting in chancery, may be the very ground of its jurisdiction, especially where the facts, which make it proper that the judgment should be set aside, have been fraudulently secreted until the year has passed. *Tice v. School Dist. No. 18, Adams county, Nebraska*, 17 Fed. Rep., 283.

After answers had been filed, and while exceptions to one of the answers were pending, the respondents, in conformity to the Alabama State practice, moved to dismiss the bill for want of equity. The granting of the motion held irregular, for which the case was reversed. *Betts v. Lewis*, 19 How., 72.

made, having shortly thereafter died, Judge Lawrence, his successor at the first session of the circuit court held by him, upon his sole authority, in the absence of the circuit judge, undertook to prescribe rules of practice for that court, directing "that the mode of proceeding in all civil causes (those of admiralty alone excepted) shall be conformable to the provisions of the code of practice of Louisiana, and of the acts of the Legislature of that State, heretofore passed, amendatory thereto." The complainant refused to comply with the order of the court touching the furnishing of copies in the French language, etc., and applied for an attachment for answer against the defendants. This the court refused to grant, and the cause came to a standstill. Complainant then applied to the Supreme Court of the United States for a mandamus, in the nature of a writ of procedendo, to compel the court below to proceed according to chancery practice, to award an attachment, and compel Relf to answer her bill, and to suffer the petitioner, in all things, to proceed in the cause in such manner as the CONSTITUTION and laws of the United States and the principles and usages in equity would authorize.

The court, Mr. Justice Story delivering the opinion, while holding that a writ of mandamus was not the appropriate remedy for any errors which might be made in a cause by a judge in the exercise of his authority, although they might seem to bear harshly or oppressively upon the party, also held that it was the duty of the court below to proceed according to the rules prescribed by the Supreme Court for proceedings in equity causes, and that the orders complained of were not in conformity therewith.

Afterwards,<sup>543</sup> Judges McKinley and Lawrence being on the circuit bench, the complainant moved the court, first, to set aside and vacate such decretal order; second, to remand the cause to the rule docket, and order that the complainant should be permitted to proceed therein according to chancery practice. The defendant resisted the application and motion, upon the ground that chancery practice should not

<sup>543</sup> *Ex Parte Myra Clark Whitney*, 13 Pet., 404.



obtain in that court, and he relied upon the treaty of cession of Louisiana to the United States from France, in 1804, sundry acts of Congress, and the rules adopted by Judge Lawrence conforming to the State code. The judges of the circuit court differing in opinion, the following questions were certified to the Supreme Court for its decision: First. Does chancery practice prevail, and should it be extended to litigants in this court and in this cause? Second. Should, or not, the said orders of the date of ninth March, 1837, be annulled and vacated? Third. Should, or not, the cause be placed upon a rule docket, and the complainant be permitted to proceed according to chancery practice, and the defendant be required to answer without oyer of the documents prayed for, or a service of the bill in French, as prayed for? The opinion of the court was delivered by Mr. Justice Thompson, who said: "These points present the same question that has been repeatedly before this court, and received its most deliberate consideration and judgment, viz., whether the proceedings in suits in equity in the courts of the United States in the district of Louisiana are required to be according to the course of chancery practice, and in conformity to that which is adopted and established in the other States? It is not intended to go into an examination of this question as one that is new and undecided, but barely to refer to the cases which have been heretofore decided by this court. In the case of *Livingston v. Story*,<sup>544</sup> which came before this court in the year 1835, the court took occasion to examine the various laws of the United States establishing and organizing the district court in Louisiana, and to decide whether that court had equity powers, and if so, what should be the mode of proceeding in the exercise of such powers. The various cases which had been before the court, involving substantially the same question in relation to the States where there were no equity State courts, or laws regulating the practice in equity causes, were referred to; and the uniform decisions of this court have been, that there being no equity State courts did not

<sup>544</sup> 9 Pet., 655.

prevent the exercise of equity jurisdiction in the courts of the United States. And it was accordingly decided that the district court of Louisiana was bound to proceed in equity causes according to the principles, rules and usages which belong to courts of equity as contradistinguished from courts of common law; that the acts of Congress have distinguished between remedies at common law and in equity; and that to effectuate the purposes of the Legislature, the remedies in the courts of the United States are to be at common law or in equity; not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derived our knowledge of those principles, subject, of course, to such alterations as Congress might think proper to make." And it is further said in the same cause: "It is matter of extreme regret that it appears to be the settled determination of the district judge not to suffer chancery practice to prevail in the circuit court in Louisiana in equity causes, in total disregard of the repeated decisions of this court; and the rules of practice established by the Supreme Court to be observed in chancery cases."

The second rule, that State laws giving relief at law in the State courts which equity alone could previously give, do not affect the equitable jurisdiction of the courts of the United States, like the first, rests upon the established distinction between law and equity as separate systems of remedial justice. The application of this rule does not depend upon the adequacy or inadequacy of the remedy, but upon the effect of State laws to compel a suitor to forego a remedy in equity to which he would otherwise be entitled under the Constitution and laws of the United States.<sup>545</sup> Thus, a bill to recover a legacy may be maintained, although the legatee has a remedy at common law by the laws of the State.<sup>546</sup> And the fact that a State statute has

<sup>545</sup> *Cropper v. Coburn*, 2 Curtis, 465.

<sup>546</sup> *Mayer v. Foulkrod*, 4 Wash., 354. In this case Mr. Justice Washington says: "If the counsel for the defendant meant to argue that, because the plaintiff might have maintained an action in the State court for the recovery of this legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doc-

provided a remedy at law against a fraudulent judgment, does not preclude the judgment debtor from a resort to equity for relief against it.<sup>547</sup>

The provision of a State code giving certain equitable remedies in courts of law to reach the property of debtors of an insolvent corporation, does not affect the right to file a bill in equity for the same purpose.<sup>548</sup> And though a State code gives special proceedings to reach the property of the judgment debtor, a creditor's bill will lie.<sup>549</sup>

The third rule, which sanctions the use by the equity courts of the United States of remedies given by State laws, although such remedies were never known to the English chancery, provided they conform substantially to chancery procedure, and are not inconsistent with the rules of Congress or rules of court made in pursuance thereof, has been so frequently adverted to in preceding portions of this work, as to render its extended examination in this place unnecessary. It is a rule, founded upon the duty of the courts, to give effect to State laws conferring substantial rights, as in *Brine v. Insurance Company*,<sup>550</sup> as well as upon the propriety of giving to suitors the benefit of new and useful remedies. For, as remarked in a case in which the effect of State laws on the equity jurisdiction of the Federal courts was being discussed, "Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."<sup>551</sup>

By an equity rule of the circuit court of the district of Vermont, the laws of that State in relation to the creation, continuation and

trine. This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy on the other side of this court. It is no argument to say that the plaintiff may have such a remedy (could it even be truly said) in the State court. The conclusive answer is; that the plaintiff is under no obligation to resort to that jurisdiction.'

<sup>547</sup> *Noyes v. Willard*, 1 Woods's, 187.

<sup>548</sup> *Putnam v. New Albany*, 4 Biss., 365.

<sup>549</sup> *Frazer & Chalmers v. Colorado Dressing and Smelting Co.*, 2 McCrary, 11; S. C., 5 Fed. Rep., 163.

<sup>550</sup> 96 U. S., 627.

<sup>551</sup> *Broderick's Will*, 21 Wall., 503 (p. 520).

termination of liens and rights created by attachment of property were adopted. Under said laws the writ of sequestration is not the writ known to English chancery, but is an attachment to create a lien. In sustaining the authority of the court to make such rule, and the propriety of the issuance of the writ in an equity suit, Mr. Justice Blatchford (Wheeler J., concurring), says: "It cannot be properly contended that the issuing of a mesne attachment in an equity suit in the circuit court in Vermont is an oppressive exercise of power, as against the owner of real estate situated in Vermont, when a like process is issuable in a suit in equity in the State court of chancery in a like case, although no such process is known in general equity practice. It is not to be supposed that any circuit court would adopt it unless it were derived from the equity practice of the State, and there seems to be great propriety in giving such process to a plaintiff in the circuit court, as otherwise he would be at a disadvantage as compared with another plaintiff in the State court of chancery in a suit against the same defendant under the same circumstances. It is reasonable to say that the power conferred by Congress and the Supreme Court was given to be exercised for purposes such as those in this case. The view that Congress may change the rule of procedure as to courts of equity which were in force in England at the time of the adoption of the Constitution, and may alter the modes and forms of enforcing rights in equity, is sanctioned by what is said in the recent case of *Ex Parte Boyd*,<sup>562</sup> and Congress may authorize the courts to do in that regard what it may do itself."

\* \* \* \* \*

"It is strongly urged that the use of mesne process, attaching property in an equity suit in advance of adjudication, is a subversion of the well established doctrines of equity jurisprudence. It is a mesne security, given *pendente lite*, operating, in that regard and to that end, like a provisional injunction, or a temporary receivership, or a writ of *ne exeat*, or the filing of a *lis pendens*. It has always been regarded by

<sup>562</sup> 105 U. S., 647.

the legislators and jurists of the enlightened State of Vermont as a proper and useful equitable remedy. If it were prescribed *eo nomine* in an act of Congress, the statute would not be obnoxious to the objection that it subverted the constitutional distinction between law and equity. So the only open question is whether the writ is lawfully provided for. Our undoubting conclusion is that the writ in this case was a valid process."<sup>553</sup>

In another case, where a demurrer was interposed to a creditor's bill, filed under a State statute, in overruling the demurrer it was said: "But these statutes in behalf of creditors adopt regulations which facilitate the progress of a cause, and the attainment of equitable relief. It is, therefore, judicious for the courts of the United States to avail themselves of these provisions which conduce to the attainment of justice."<sup>554</sup>

**§ 112. Distinction between Law and Equity in Removal Cases.**—The rule which inhibits, in the Federal courts, the union of legal and equitable causes of action in one suit, applies to cases removed from the State courts.<sup>555</sup> And the rule will be enforced, however variant from the practice of the State courts.<sup>556</sup>

So, where a complaint filed in the State court before the removal of a cause prays for relief purely legal, and also for relief purely equitable, the plaintiff must replead in the Federal court.<sup>557</sup> And he may divide his cause into a legal and an equitable action.<sup>558</sup> Or,

<sup>553</sup> *Steam Stone Cutter Co. v. Jones*, 13 Fed. Rep., 567 (pp. 581, 582).

<sup>554</sup> *Lanmon v. Clark*, 4 McLean, 18; see, also, *Wilkinson v. Yale*, 6 McLean, 16.

<sup>555</sup> *Thompson v. Railroad Companies*, 6 Wall., 134; *Hurt v. Hollingsworth*, 100 U. S., 100; *Benedict v. Williams*, 10 Fed. Rep., 208, and other cases cited in note 314, p. 167, *ante*.

A suit instituted under a State statute in the circuit court of a State by an alleged legatee under a lost will, against the sole heir-at-law, to establish the will, is a suit of a civil nature in equity, involving a controversy between the parties to it: and, where they are citizens of different States, such suit may be removed, under the act of Congress, to the Federal court. *Southworth v. Adams*, 9 Biss., 521.

<sup>556</sup> *Hurt v. Hollingsworth*, 100 U. S., 100.

<sup>557</sup> *LaMothe Mfg Co. v. National Tube Works*, 15 Blatch., 432.

<sup>558</sup> *Fisk v. Union Pacific R. R. Co.*, 8 Blatch., 299.

where his suit embraces both legal and equitable grounds of relief, he may amend by erasing the prayer for the one or the other.<sup>559</sup>

The enforcement of the distinction between law and equity is not to be carried, however, to the extent of holding void the proceedings in the State court before removal. Thus, where a citizen of New Hampshire filed a bill against the Continental Life Insurance Company in the State court of chancery of Vermont, serving process upon a statutory agent, as authorized by the laws of that State, and the defendant appeared and demurred to the bill for want of jurisdiction acquired by the service, and for want of equity, it was held that the jurisdiction of the Federal court was to be measured by that of the State court of chancery, and that as the jurisdiction had attached, it would remain.<sup>560</sup> It has also been held that an injunction granted in a cause removed from a State court will not be dissolved upon the ground that the bill filed in such court was not verified according to law and the practice of courts of chancery.<sup>561</sup>

The objection that the claim of a defendant is a legal claim and cannot be tried in the suit, is untenable. The court may, in such case, order the issue of fact to be tried by a jury upon the law side of the court, but this does not affect the right of removal. *Ketchum v. Black River Lumber Company*, 4 Fed. Rep., 139.

<sup>559</sup> *Stafford National Bank v. Sprague*, 19 Blatch., 529.

<sup>560</sup> *Hale v. Continental Life Ins. Co.*, 12 Fed. Rep., 359.

The act of March 3, 1875, section 6, refers to the stage of the proceedings in the suit at which the proceedings in the circuit court are to commence, rather than to the form, force, or effect of the pleadings in the cause previously had, leaving the provisions of Rev. Stat., 639, in force as to them; and, if the pleadings are in form, and verified, so as to be regular and valid in the State courts, the intention and effect of the statute and rules would seem to be that they are to be taken to be so on reaching the Federal courts in cases of removal. *Leo v. Union Pacific Railway Company*, 17 Fed. Rep., 273.

As to validity of proceedings had in State court before removal, see *Duncan v. Gegan*, 101 U. S., 810.

<sup>561</sup> *Smith v. Schwed*, 2 McCrary, 441.

In this case McCrary, J., says: "No doubt this court may, upon proper showing, in a case removed, vacate or modify an injunction allowed in the case by the State court, and before removal; but such an order should not be made as the result of the consideration of any question of pleadings or practice decided by the State court before it was deprived of jurisdiction."

Where an injunction is granted and a receiver appointed by the State court without notice to the defendants, and no motion to dissolve the injunction and discharge

**§ 113. Distinction between Law and Equity in Appellate Proceedings.**—With respect to the review by the Supreme Court of the United States of the judgments and decrees of State courts, this is always by *writ of error*, without regard to the legal or equitable nature of the cause.<sup>562</sup>

Judgments at law in the courts of the United States are reviewed by writ of error, and decrees in equity by appeal. And an examination of the adjudged cases will show that the failure to observe this difference in the mode of obtaining a review, based upon the difference between the legal and equitable character of the cause, has resulted in frequent dismissals.<sup>563</sup> In a case brought up from Louisiana by writ of error, when it should have been by appeal, and which was, consequently, dismissed, it is said. “We have so often decided that, notwithstanding the peculiarities of the civil code of Louisiana, the distinctions between law and equity must be preserved in the Federal courts, and that equity causes from that circuit must come here by appeal, and common law causes by writ of error, that we cannot now depart from that rule without overruling numerous decisions and a well settled course of practice.”<sup>564</sup> The rule here stated was formerly

the receiver is made and acted upon in the State court before the removal of the cause, such motion may be made and heard in the circuit court, upon due notice to the plaintiff, at any time after the record in the case is filed in that court. *Texas and St. Louis Railway Co., in Missouri and Arkansas, v. Rusk*, 17 Fed. Rep., 275.

<sup>562</sup> Revised Statutes, section 709. See section 17, p. 136, *ante*.

<sup>563</sup> *United States, v. Emholt*, 105 U. S. 414; *Hayes v. Fischer*, 102 U. S. 121; *Jones v. LaVallette*, 5 Wall., 579.

<sup>564</sup> *Walker v. Dreville*, 12 Wall., 440.

Where an “action of jactitation,” or “slander of title,” was brought in a State court of Louisiana and removed into the circuit court of the United States by the defendant, who was a citizen of Mississippi (the persons who brought the action being in possession of the land under a legal title), and the defendant pleaded in reconvention, setting up an equitable title, and the court below decreed against the defendant, it was proper for him to bring the case to this court by appeal, and not by writ of error. *Surgett v. Lapice, et al.*, 8 How., 48. See, also, *McCollum v. Eager*, 2 How., 61.

applied to Territories.<sup>565</sup> But the law now is, that in cases of trial by jury, the appellate jurisdiction of the Supreme Court shall be exercised by writ of error, and in all other cases by appeal.<sup>566</sup> Where the rule is violated, the case will be dismissed.<sup>567</sup>

<sup>565</sup> *Parish v. Ellis*, 16 Pet., 451; *Brewster v. Wakefield*, 22 How., 118.

<sup>566</sup> See section 2, act of April 7, 1875, 1 Statutes at Large, p. 27; Supp. to Revised Statutes, vol. 1, p. 12.

<sup>567</sup> *Hecht v. Boughton*, 105 U. S., 235; *United States v. R. R. Co.*, 105 U. S., 263; *Strongfellow v. Cain*, 99 U. S., 610.



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